Supreme Court, U.S.
FILED
97 1897 FEB 6 1998
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALLEN DEBORD and DEBRA DEBORD, Individually and as next friends for KELLY DEBORD, Minor,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE FERGUSON-FLORISSANT SCHOOL DISTRICT, SHIRLEY SALMON, JOYCE DREIMEIER, and CINDY ORMSBY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

REBECCA S. STITH*
STEPHEN E. ROTHENBERG
DAYNA F. DECK
Suite One East
6609 Clayton Road
St. Louis, Missouri 63117
Phone: (314) 721-2500
Fax: (314) 721-0606

Attorneys for Petitioners

*Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

QUESTION PRESENTED FOR REVIEW

Do Speculative Concerns about Harm to the Student and Liability to School District Personnel Excuse A School District from Its Obligations under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act to Make Reasonable Modifications of Its Policies in Order to Accommodate a Student's Disability?

TABLE OF CONTENTS

	Page
Questions Presented	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdictional Statement	1
Statute and Regulations Involved	1
Statement of the Case	2
Reasons for Granting the Petition for Certiorari	8
Conclusion	18
Appendix	A-1

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexander v. Choate, 469 U.S. 287, 105 S. Ct. 712 (1985) 8,9

Arline v. School Board of Nassau County, 480 U.S. 273, 107 S. Ct. 1123 (1987) 8,15

Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir. 1982) 8,13

Cedar Rapids Community School District v. Garret F., 106 F.3d 822 (8th Cir. 1997) 12

Davis v. Francis Howell School District, 104 F.3d 204 (8th Cir. 1997) 16

Dennin v. Connecticut Interscholastic Athletic Conference, 913 F .Supp. 663 (D. Conn. 1996), *vacated on other grounds*, 94 F.3d 96 (2d Cir. 1996) 17

Grube v. Bethlehem Area School District, 550 F. Supp. 418 (E.D. Pa. 1982) 13

Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37 (2d Cir. 1997) 16

International Union v. Johnson Controls, Inc. 499 U.S. 187 111 S. Ct. 1196 (1991) 8,11,12,14

Irving Independent School District v. Tatro, 468 U.S. 883, 104 S. Ct. 3371 (1984) 8,11,12,14

Jeremy H. v. Mount Lebanon School District, 95 F.3d 272 (3d Cir. 1995) 8,12

Johnson v. Gambrinus Company/Spoetzel Brewery, 116 F.3d 1052 (5th Cir. 1997) 16

Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir.), *cert. denied*, 493 U.S. 892 (1989) 8,16

Lori v. Vande Zande, 44 F.3d 538 (7th Cir. 1995) 16

Mendez v. Gearan, 956 F. Supp. 1520 (N.D. Cal. 1997) 10,11

Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir.), *cert. denied*, 118 S. Ct.441 (1997) 8,13

Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D.N.J. 1980) 13,14

Pottgen v. MSHSAA, 40 F.3d 926 (8th Cir. 1994) 8,10

Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981) 14

Reagen v. Weaver, 886 F.2d 194 (8th Cir. 1989) 8,9,16

Rosa H. v. San Elizario Independent Sch. Dist., 106 F.3d 648 (5th Cir. 1997) 14

Teahan v. Metropolitan-North Commuter Railroad Co., 951 F.2d 511 (2d Cir. 1991) 16

Todd v. Elkins School District, 105 F.3d 883 (8th Cir. 1997) 8,12

W. B. v. Matula, 67 F.3d 484 (3d Cir. 1995) 8,11

Wynne v. Tufts University Sch. of Medicine, 932 F.2d 19 (1st Cir. 1991), *cert. denied*, 507 U.S. 1030, 113 S. Ct. 1845 (1993) 8,9,14

Statutes and Regulations:

29 U.S.C. §794(a) 1

42 U.S.C. §12131(2) 1

28 C.F.R. 35.130(b)(7) 2

Administrative Decisions:

Berliin Brothersvalley (PA) School District, OCR Region III, 353:124 (OCR, December 23, 1988) 14

Fairfield-Suisun (CA) Unified School District, OCR Region IX, (OCR, March 17, 1989) 14

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 126 F.3d 1102 (8th Cir. 1997) and is reprinted in the Appendix. (App. A, A-1). The denial of reconsideration by the panel and the court en banc is reprinted in the Appendix. (App. B, A-2). The memorandum decision of the United States District Court for the Eastern District of Missouri (Jackson, J.) granting Defendants' Motion for Summary Judgment is unreported and is reprinted in the Appendix. (App. C., A-10).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit entered its judgment on September 11, 1997. Petitioners sought rehearing by the panel and rehearing en banc. The petition for rehearing was denied on November 14, 1997. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act, 29 U.S.C. §794(a), provides in relevant part:

> (a) No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Title II of the Americans with Disabilities Act, 42 U.S.C.§12131(2) provides:

> (2) The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Title II regulation, 28 C.F.R. 35.130(b)(7), provides that covered entities must:

> make reasonable modifications in policies . . . when the modifications are necessary to avoid discrimination on the basis of a disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service.

STATEMENT OF THE CASE

The board of education of a public school district and certain individuals ("Respondents" or "District") have refused to give Petitioner Kelly DeBord, a minor child with a disability under the applicable laws, the prescribed medication that her condition requires so that she can learn at school.

Kelly, now a third grade student at Robinwood Elementary School in the Ferguson-Florissant School District, St. Louis County, Missouri, has been under the care of pediatrician Dr. Sheldon Kessler since her birth on March 8, 1989. In 1993, Dr. Kessler diagnosed Kelly, then four years old, with severe Attention Deficit Hyperactivity Disorder ("ADHD"). Dr. Kessler's diagnosis was confirmed by Dr. David Guckas, Ph.D. Dr. Kessler, a pediatrician specializing in the treatment of ADHD who authored "Drug Therapy in Attention Deficit Hyperactivity Disorder," *Southern Medical Journal* (Jan. 1996), has successfully treated Kelly with sustained release Ritalin SR ("Ritalin").

During the course of treating Kelly's ADHD, Dr. Kessler prescribed 100mg of Ritalin upon her rising in the morning and 40mg of Ritalin at 3:30 p.m., after Kelly was home from school, in order to keep the level of Ritalin in her system up at an effective level. Kelly benefited from this dose level and experienced no harmful effects. Just prior to February 14, 1996, Dr. Kessler moved Kelly's 40mg afternoon dose to 3:00 p.m., when Kelly is still in school, because the 3:30 p.m. dose was no longer as effective. As Respondents admitted, Kelly has never displayed any adverse effects from this dosage of Ritalin.

Respondent Joyce Dreimeier, a school nurse, refused to give Kelly her prescribed medication at 3:00 p.m. On February 15, 1996, she informed Mrs. DeBord by telephone that she would not administer the afternoon 40mg Ritalin dose to Kelly because her daily dose would then exceed the 60mg daily recommendation listed in the Physician's Desk Reference ("PDR") for Ritalin. Dr. Kessler provided the school with information on Kelly's condition and verified the safety and necessity of the dosage and timing of the Ritalin. Respondents, including the nurse, continued to refuse to administer the 40mg Ritalin to Kelly. Respondent nurse admitted that she is not licensed to practice medicine or to diagnose and treat patients, has had only one class in pharmacology at least 13 years ago, has only a "passing familiarity" with Ritalin, and is not aware of any studies reporting adverse effects from long-term use of high doses of Ritalin. In addition, the Respondents, including the nurse, admitted that the foreword of the PDR expressly states that the FDA "does not . . . limit the manner in which a physician may used an approved drug."

Respondents refused to modify a District policy of "never knowingly" administering a dose of medication that exceeds the PDR daily recommendation even where such policy admittedly prevents a disabled student, here Kelly, from receiving the medication necessary to accommodate her disability. Respon-

dents admitted that their policy of not administering medication doses that exceed PDR recommendations has the effect of treating Kelly differently than all other children in the District who receive prescribed daily doses of medication. Kelly is the only student, among 442 children in the District who receive daily doses of Ritalin from the school nurses, not given her medication. Respondent nurse admitted that she would never accommodate a student requiring an above-PDR dose "regardless of the student's alleged disability [or] degree of alleged disability." However, Respondents' own physician consultant, Dr. Garrett Burris, admitted that in unusual cases a child-patient may require up to 300mg of Ritalin daily.

Other doctors agreed that some patients need a higher-than-usual dose of medication. Dr. Simon Horenstein, who examined Kelly, concluded that the Ritalin dose given Kelly is safe, effective and necessary and that her treatment should not be limited by the dosage level listed in the PDR. Dr. Horenstein, a professor emeritus of child and adult neurology at Saint Louis University, testified at the preliminary injunction hearing that Kelly has ADHD, shows no harmful effects from her high dose of Ritalin, and was doing quite well on such a dose. Dr. Horenstein testified that there are many other medications where "off-label" (off-PDR) use may occur, including exceeding the recommended range of phenytoin for epilepsy; prescribing the anticonvulsant valporic acid for the off-label use of treating mania; and prescribing the anti-hypertensive clonidine for the off-label use of treating ADHD. He noted that exceeding the PDR recommendation may not only be a proper but essential treatment of the individual, particularly with Ritalin SR because of its variable absorption rate by patients. Dr. Till Davy testified, after reviewing Kelly's medical records, that high dose use of Ritalin SR may be necessary for some patients and, that, as long as no adverse effects are noted, the dose may be increased until the optimum benefit is reached. He is personally familiar with cases where children have benefited from up to 650mg of Ritalin

per day with no harm to the patient. He noted that the PDR was never intended to restrict the physician's treatment prescriptions and that the school nurse should administer the medication without concern once she has verified the prescription's accuracy and safety with the treating physician.

Affidavits from other medical experts further supported the safety and necessity of high dose use of stimulant medication such as Ritalin to treat ADHD in certain individuals. Dr. Charles Popper, Harvard University Department of Psychiatry faculty member and the founder and editor of the *Journal of Child and Adolescent Psychopharmacology*, attested that high doses of Ritalin may be necessary and that the PDR is not intended by the FDA to function as limits on medication doses selected by clinicians. In his opinion, high dose use of Ritalin, where the therapeutic benefit occurs without adverse effects, would actually be a "routine" course of treatment. Dr. C. Keith Conners, an ADHD expert in the Duke University Psychiatry Department, submitted an affidavit which agreed with the conclusions of Drs. Horenstein, Davy and Popper.

Respondents offered no evidence of harm to Kelly or any child from the long-term use of Ritalin in high doses or otherwise. Respondents offered no evidence to counter Kelly's demonstrated need for and benefit from her particular dose of Ritalin. Respondents offered no evidence to counter Petitioners' evidence that doctors may prescribe medications at dosage levels in the best interests of their individual patients regardless of PDR recommendations. Respondents offered no evidence to support their speculative concerns of harm to the child or personal liability for the nurse if Kelly received her medication as prescribed. Respondents offered no evidence to counter that the District's PDR-limit policy singles out a particular group of students for less favorable treatment — those whose disabilities require particular medications and/or dosages of medication outside uses recommended in the PDR.

Respondents never challenged the DeBords' requested modification of the PDR-limit policy as "unreasonable" by asserting either of the two recognized affirmative defenses: undue administrative or financial burden, or fundamental alteration in a program. Respondents never offered to modify the District's policies to accommodate Kelly once the safety and efficacy of her prescribed Ritalin were verified. Instead, Respondents requested that the DeBords modify their lives so that Mrs. DeBord (or a designee) could give Kelly the Ritalin at school or pick her up early. The District also requested that Dr. Kessler modify his carefully titrated treatment of Kelly by changing the dosage or timing of the Ritalin.

In April 1996, the DeBords filed suit in the United States District Court for the Eastern District of Missouri, alleging violations of Title II, §504 and §1983. The District Court agreed with Petitioners that Kelly DeBord has a disability, ADHD, within the meaning of Title II of the ADA and §504, that Kelly needs her dose of Ritalin in order to learn, and that Respondents' concerns about harm and liability had sparse evidentiary support. The District Court granted summary judgment for Respondents, holding that their alternatives were reasonable as a matter of law and that their refusal to modify their PDR-limit policy based on their concerns of harm and liability did not constitute discrimination against Kelly. (App. C, A-10 - A-24).

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's grant of summary judgment. The Eighth Circuit recognized that school districts discriminate in violation of Title II and Section 504 when they fail to make reasonable modifications in policies in order to provide meaningful access to their programs. The Court further recognized that Respondents failed to raise an affirmative defense. The Court chose to ignore evidence that the PDR-limit policy prevents certain students from receiving their high-dose medications as prescribed to hold that the DeBords "have not tried to

show" that the District's PDR-limit policy "has the effect of discriminating against the disabled or the severely disabled." (App. B, A-6). The Court also chose to ignore the evidence that no deleterious effects from the long-term use of Ritalin have been documented to find that "no one knows what the long term effects of high doses of Ritalin may be." (App. B., A-8). Having ignored contrary evidence, the Eighth Circuit then made the factual finding, with no evidentiary support in the record, that the requested policy modification "would impose an undue administrative burden on the school district to verify the safety of an excess dosage in each individual case" and that, therefore, the DeBords' requested accommodation was "not reasonable." (App. B, A-8). The Court concluded that the District's stated concerns about harm and liability "might be speculative, but they are not unreasonable." (App. B, A-8). This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

The U.S. Court of Appeals For The Eighth Circuit Has Decided An Important Question Of Federal Law In A Way That Conflicts With Applicable Statutes And Relevant Decisions Of This Court And U.S. Courts Of Appeals.

The *Debord* case arises under two federal statutes, Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. 12131 *et seq.*, and §504 of the Rehabilitation Act of 1973 ("§504"), 29 U.S.C. 794, which must be construed consistently with each other. *See, e.g., Pottgen v. MSHSAA*, 40 F.3d 926, 929-930 (8th Cir. 1994). The Eighth Circuit decision in *DeBord* conflicts with the reasoning of, *inter alia, Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712 (1985); *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371 (1984); *Arline v. School Board of Nassau County*, 480 U.S. 273, 107 S.Ct. 1123 (1987); *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S. Ct. 1196 (1991), as well as *Jeremy H. v. Mount Lebanon School District*, 95 F.3d 272, 278 (3d Cir. 1995); *W. B. v. Matula*, 67 F.3d 484 (3d Cir. 1995); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir.), *cert. denied*, 118 S.Ct. 441 (1997); *Todd v. Ellins School Dist.*, 105 F.3d 663 (8th Cir. 1997), *Wynne v. Tufts University Sch. of Medicine*, 932 F.2d 19 (1st Cir. 1991), *cert. denied*, 507 U.S. 1030, 113 S.Ct. 1845 (1993); *Reagen v. Weaver*, 886 F.2d 194 (8th Cir. 1989); *Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989); and *Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982).

Speculative Concerns About Harm And Liability Cannot Excuse The Statutory Obligation To Make Reasonable Modifications Of Policies To Allow Individuals With Disabilities Meaningful Access To Programs And Services

Petitioner Kelly DeBord, who has ADHD, needs an unusually high dose of Ritalin in order to learn and otherwise lead a normal life. Notwithstanding Kelly's acknowledged need for and benefit from this medication, Respondents have refused to modify a school district policy of "never knowingly" giving a dose of medication outside the dose level recommended in the PDR. In so doing, Respondents are circumventing their statutory obligations under §504 and Title II. Respondents cite speculative concerns of possible harm to the child and potential liability to the nurse to support their refusal — concerns which this Court has rejected as invalid for justifying otherwise unlawful discrimination.

Title II, §504 and their implementing regulations require the school district, not the disabled student, to reasonably modify its policies to provide "meaningful access" to its programs and services. §12131(2); *Choate*, 469 U.S. at 301 & n. 21. "The benefit, itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled[.]" *Id.* at 301. *See also Wynne v. Tufts University Sch. of Medicine*, 932 F.2d 19, 25 (1st Cir. 1991)("there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person"); *Reagen v. Weaver*, 886 F.2d 194, 198 (8th Cir. 1989)(State of Missouri violated §504 by denying AZT to patients because they did not fit FDA-approved criteria).

The Eighth Circuit also engaged in impermissible fact-finding, based on nothing in the record below, in order to reach a decision favoring the District. If, as in this case, a school district

refuses to comply with its legal obligation to reasonably modify its policy to give a student meaningful access to its health services, it must assert either the affirmative defense of fundamental alteration of policy or the affirmative defense of undue administrative or financial burden. *Pottgen v. MSHSAA*, 40 F.3d 926 (8th Cir. 1994). Here, the District failed to assert either affirmative defense or even to present evidence on them. Nonetheless, the *DeBord* court, while acknowledging this deficiency in Respondents' case, improperly made the factual finding that modifying the PDR-limit policy by verifying the safety of a dose for a particular student would somehow be an "undue administrative burden" for the District, thereby making the DeBords' requested modification "not reasonable." (App. B, A-8). It rested its ruling on yet another factual finding, that, "[a]t this time, no one knows what the long term effects of high doses of Ritalin might be," wholly ignoring evidence submitted by Petitioners and never countered by Respondents that longitudinal studies show no deleterious effects from the long term use of Ritalin. The Eighth Circuit then acknowledged that Respondents' concerns were "speculative" but still found them "not unreasonable." (App. B, A-8).

The Eighth Circuit, like the Respondents, relied upon an archaic and factually unsupported understanding of Ritalin in order to rationalize Respondents' otherwise unlawful refusal to give Kelly her medication as prescribed. "'Individuals with handicaps are all too often excluded from school and education programs . . . because of archaic attitudes[.]'" *Mendez v. Gearan*, 956 F.Supp. 1520, 1527 (N.D. Cal. 1997), quoting S.Rep. 93-1297, 93d Cong. 2d Sess. 32. Where the decision-maker, the District, has excluded the disabled individual, Kelly DeBord, from a service without "carefully examining the relevant evidence regarding the disability and the likelihood of harm, a court must assume that the decision-maker based the exclusion on unfounded presumptions about the disability" — including, as

here, the medication necessary to treat the disability. *Mendez*, 956 F.Supp at 1527.

Contrary to the Eighth Circuit in *DeBord*, concerns about harm and liability are plainly invalid under the reasoning of this Court in *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371 (1984)(involving the predecessor to Individuals with Disabilities in Education Act or "IDEA"). In *Tatro*, the Court expressly recognized that school nurses "are authorized to dispense oral medications [to 'nonhandicapped children'] *in accordance with a physician's prescription.*" *Id.* at 3377-3378 (emphasis added). As to a school district's purported concerns about the

> numerous possibilities for *injury and liability*, . . . Congress assumed that *states receiving generous grants under the Act were up to the job of managing these new risks.* Whether [a district] decides to purchase more liability insurance or to persuade the State to extend the limitation on liability, *the risks imposed . . . should not prove to be a large burden. Id.* at n. 12. (Emphasis added.)

Although fully briefed, the Eighth Circuit ignored the edict of *Tatro* and the supporting, analogous reasoning of *Johnson Controls, infra.* Indeed, the *DeBord* court failed to address either of these Supreme Court cases at all. Yet, the Third Circuit and a different Eighth Circuit panel have recognized that *Tatro*, a case under IDEA, necessarily applies to interpretations of §504 because both laws seek to root out discrimination against students with disabilities and therefore must be construed consistently with each other. *See, e.g., W. B. v. Matula*, 67 F.3d 484 (3d Cir. 1995)("There appear to be few differences, if any, between the IDEA's affirmative duty and §504's [and the ADA's] negative prohibition . . . the regulations implementing §504 adopt the IDEA language requiring that schools . . . shall provide a free appropriate public education to each qualified handicapped

person"); *accord, Todd, supra* (8th Cir. 1997)[1] (construing IDEA regulations and Rehabilitation Act regulations consistently); *Jeremy H. v. Mount Lebanon School District*, 95 F.3d 272, 278 (3d Cir. 1995).

The Supreme Court further elaborated upon the irrelevance of the "harm and liability" defense in the analogously reasoned case of *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S. Ct. 1196 (1991). In rejecting the employer's argument that its policy barring women from lead-exposure jobs was designed to minimize both potential harm to fetuses and possible liability of the company for fetal injuries, this Court pointed out:

> If, under general tort principles, Title VII bans sex-specific fetal protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the *basis for holding an employer liable seems remote at best* . . . . When it is impossible for an employer to comply with both state and federal requirements, this Court has ruled that *federal law preempts that of the States*. . . . [To hold otherwise,] would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the [federal anti-discrimination] statute demands[.] *Id.* at 208-209. (Emphasis added.)

As with the employer in *Johnson Controls* who unlawfully relied on concerns about harm and liability to avoid its Title VII

---

[1] Ironically, yet another Eighth Circuit panel recently held that the *Tatro* bright-line test between medical and non-medical "related services" requires a school district, under the IDEA, to provide a full-time nurse for a child whose disability requires daily catheterization and tracheostomies — procedures fraught with far more risk of harm to the child and liability to the nurse than administering a few Ritalin tablets to a child. *See Cedar Rapids Community School Dist. V. Garret F.*, 106 F.3d 822 (8th Cir. 1997).

obligation not to discriminate, the school district in *DeBord* cannot be allowed to hide behind admittedly speculative fears of harm and liability to avoid its obligation to reasonably modify its PDR-limit policy. The school district's totally unsubstantiated concerns cannot be allowed to "stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in passing §504 and the ADA. *Id.* at 210 (citation omitted).

Courts in the First, Third, Ninth and Tenth Circuits, as well as another Eighth Circuit panel and the federal agency charged with enforcing the regulations of Title II and §504, have followed this Court's reasoning in concluding that concerns about harm and liability — particularly unsupported concerns — cannot excuse the obligation to make reasonable modifications of policies, including where necessary to give medication to a student, no matter how "reasonable" or "rational" these speculative concerns may appear. As the Ninth Circuit warned over fifteen years ago, "Any qualification based on risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at greater risk from . . . injuries." *Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982). Within the last year, a different panel of the Eighth Circuit rejected the employer's concerns about harm and liability as excusing its discriminatory treatment under the ADA of an employee perceived to have an alcohol problem. *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997).

In the Third Circuit, the court in *Grube v. Bethlehem Area School Dist.*, 550 F.Supp. 418, 424 (E.D.Pa. 1982) held that §504 requires school to grant request of one-kidney student to play football notwithstanding the risk of injury and liability. Similarly, the court in *Poole v. South Plainsfield Bd. Of Educ.*, 490 F.Supp. 948, 953 (D.N.J. 1980) denied the school board's summary judgment motion to dismiss student's §504 claim even

though that board's refusal to allow one-kidney student to wrestle was based on doctors' concerns of possible harm to the student and the school's fear of liability. A school "ha[s] neither the duty nor the right under §504 [to] impos[e] its own rational decision over the rational decision of the famil[y]." *Poole*, 490 F.Supp. at 953. *Accord, Wynne v. Tufts University Sch. of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991)(recognizing the "tension" between the "statutory rights of a handicapped individual" and "concerns for insulating officials from personal monetary liability"); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1383 (10th Cir. 1981)("The mere fact that the [entity] acted in a rational manner is no defense to an act of discrimination"). Concerns about harm and liability, no matter how sincere or paternalistic, cannot be used to avoid one's statutory obligation to provide a reasonable accommodation.

Likewise, the Office for Civil Rights of the U.S. Department of Education ("OCR"), the agency charged with enforcing the regulations of Title II and §504, has issued opinions which follow the reasoning of this Court in *Tatro* and *Johnson Controls* and in the cases cited above. OCR interpretations are entitled to substantial deference. *Rosa H. V. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997). In *Berlin Brothersvalley (PA) School District*, OCR Region III, 353:124 (OCR, December 23, 1988), the OCR held that a school district which refused to administer prescribed medication violated §504 by having a policy which allowed the district the discretion not to administer prescribed medication to a student with a disability and required parents of handicapped students to sign a liability waiver in case the student were harmed. *See also Fairfield-Suisun (CA) Unified School District*, OCR Region IX (OCR, March 17, 1989) (§504 violations occurred where district refused to monitor ADHD student's noontime dose of Ritalin, failed to provide parents with notice of procedural safeguards required by § 504 regulations, failed to assess student's needs as required by §504 regulations,

and failed to provide a free appropriate public education because absence of Ritalin caused student's ADHD to interfere with his learning and ability to benefit from other parts of educational program).[2]

Archaic Reactions To The Particular Treatment Or Medication Necessary To Accommodate The Disability Can Constitute Discrimination Against The Disability Itself When The Individual With A Disability Is Denied Meaningful Access To Programs And Services Because Of Such Archaic Views

Further, entities cannot be allowed to push the otherwise invalid harm-and-liability excuse through a back-door by claiming it is merely reacting against the medication and not the disability, itself, when the evidence, medical and beyond, shows the inextricable link between the disability and medication at issue. Discrimination against the medically necessary medication, here, high-dose Ritalin, is discrimination against the disability, itself. In the instant case, the Respondent nurse reacted against the high-dose use of Ritalin despite strong medical evidence that it was safe, necessary and effective for this child. Her archaic, discriminatory, medically unsound reaction — embodied in the District's PDR-limit policy — prevailed, thereby allowing Respondents to avoid their express statutory duty to reasonably modify their PDR-limit policy in order to accommodate Kelly's disability.

As this Court noted in its landmark opinion on the scope of the Rehabilitation Act, "The Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and *medically sound* judgments." *Arline v. School Board of Nassau County*, 480 U.S. 273, 284, 107

---

[2] These OCR opinions are contained in the record below which will be filed with this Court if petition for certiorari is granted. S.Ct.R. 26.

S.Ct. 1123 (1987) (emphasis added). Thus, one "may not require the person with the disability to be separated from the service [needed]" because of a rigid reading of a particular policy or because one does not happen to like the particular service required. *Johnson v. Gambrinus Company/Spoetzel Brewery*, 116 F.3d 1052, 1061 & n. 6 (5th Cir. 1997)(ADA required a modification of a "blanket no animals policy" at a brewery so that a visitor could be permitted to tour the facility with his guide dog, even though the policy was based on FDA-regulation to minimize contamination at breweries).[3] Other circuits, including the Eighth, have followed similar reasoning. *See, e.g., also Lori v. Vande Zande*, 44 F.3d 538, 543 (7th Cir. 1995)("a characteristic manifestation of an admitted disability is . . . a part of the underlying disability and hence a condition the [defendant] must reasonably accommodate"); *Teahan v. Metro-North Commuter Railroad Co.*, 951 F.2d 511, 516 (2d Cir. 1991)("[A]n employer 'relies' on a handicap when it justifies termination based on conduct caused by the handicap") ; *Reagen v. Weaver*, 886 F.2d 194, 198 (8th Cir. 1989)(State of Missouri violated §504 by denying AZT to patients whose doctors prescribed such treatment notwithstanding the possibly "experimental" nature of the drug involved); *Kohl v. Woodhaven Learning Center*, 865 F.2d 930, 935 (8th Cir. 1989)(in rejecting defendant's argument that its refusal to admit plaintiff was based on concerns other than his hepatitis-carrier status, the Court noted, "All these rationales . . . boil down to Kohl's being a carrier").

The *DeBord* court, nonetheless, apparently reasoned that reacting against the level of medication needed to accommodate a particular disability — based on wholly unsupported, speculative concerns about harm and liability — was not discrimination against the disability, itself. App. at 5. *See also Davis v. Francis*

---

[3] *Johnson* involved Title III of the ADA. Title II and Title III of the ADA must be interpreted consistently with one another. *Innovative Health Sys., Inc. V. City of White Plains*, 117 F.3d 37, 47 (2d Cir. 1997).

Howell School District, 104 F.3d 204 (8th Cir. 1997)(same reasoning in legally and factually similar case). (App. B., A-5) (citing *Davis*). Such reasoning is at odds with decisions in the Second, Fifth, Seventh and Eighth cases cited above — that an entity cannot bypass its statutory obligation to reasonably modify policies to accommodate individuals with disabilities by claiming that it is acting against a manifestation of the disability rather than the disability itself. Here, Respondents contended that they were acting against an "excessive" dose of Ritalin, not against Kelly's disability which admittedly requires that dose of Ritalin. Yet, this "argument ignores the fact that the *sole* reason that [Kelly needs the medication] is due to [her] disability." *Dennin v. Connecticut Interscholastic Athletic Conference*, 913 F.Supp. 663, 669 (D. Conn. 1996)(emphasis original), *vacated on other grounds*, 94 F.3d 96 (2d Cir. 1996).

School districts cannot be permitted to avoid their statutory obligations to provide reasonable accommodations to students by hiding behind a policy or rule that purports to attack the medication or dose of medication needed to treat the disability rather than the disability, itself. "'To accept such an analysis would mean that any student who fails to meet such requirement [of needing below PDR-levels of medication] as a result of [her] handicap is not .... protected by the Rehabilitation Act' [or Title II.] [This] argument would result in the rule insulating itself from scrutiny." *Id.* (Citations omitted.)

CONCLUSION

The Eighth Circuit has now placed disabled students and school districts in an untenable position: under federal law, students with disabilities must be reasonably accommodated if necessary for them to benefit from the school districts' services and programs — yet, school districts in the Eighth Circuit may now, with impunity, avoid such statutory obligations simply by voicing wholly speculative concerns of harm and liability, thereby leaving disabled students without the reasonable accommodations to which they are indisputably entitled. Such reasoning is at odds with decisions of this Court and several U.S. Courts of Appeals (including the Eighth Circuit). Moreover, carried to its logical extension, such reasoning would permit school districts and other public entities to escape their statutory obligations in a host of other situations involving disabled persons (*e.g.*, wheelchair ramps for mobility-impaired students could be torn down because of speculative concerns of harm and liability, with the parent or guardian required to carry the child around the school).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

REBECCA S. STITH*
STEPHEN E. ROTHENBERG
DAYNA F. DECK
Suite One East
6609 Clayton Road
St. Louis, Missouri 63117
Phone: 314-721-2500
Fax 314-721-0606

Attorneys for Petitioners

*Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-4280EMSL

Allen DeBord, etc., et al.,
Appellants,

vs.

Board of Education of the
Ferguson-Florissant School District, et al.,
Appellees.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc.

The joint suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 14, 1997

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-4280EM

Allen DeBord, Individually and as
next friend for Kelly DeBord; Debra DeBord, Individually
and as next friend for Kelly DeBord,

Appellants,

v.

Board of Education of the Ferguson-Florissant School District; Shirley Salmon; Joyce Dreimeier; Cindy Ormsby,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: September 11, 1997
Filed: October 9, 1997

Before FAGG, WOLLMAN, and LOKEN, Circuit Judges.

FAGG, Circuit Judge.

In this student disability discrimination case, parents Allen and Debra DeBord appeal the district court's grant of summary judgment to the Board of Education of the Ferguson-Florissant School District and three individual defendants (collectively the school district). We affirm.

The DeBords' eight-year-old daughter, Kelly, has attention deficit hyperactivity disorder (ADHD). To treat her condition, Kelly's doctor prescribed one hundred milligrams of sustained release Ritalin when Kelly arises in the morning, and forty milligrams of the drug at 3:00 in the afternoon while Kelly is still at school. The school district provides health services to stu-

dents, including administration of prescription drugs during school hours, but the school district has a written policy against administering prescription drugs in an amount exceeding the recommended daily dosage listed in the *Physicians' Desk Reference* (PDR). Joyce Dreimeier, the nurse at Kelly's elementary school, refused to give Kelly her afternoon dose because Kelly's daily intake of Ritalin exceeds the sixty milligram daily recommendation listed in the PDR. The DeBords appealed to the Board of Education, providing a letter from Kelly's doctor confirming her prescription, some medical information about high dose use of Ritalin, and an offer to sign a waiver of liability. The school board declined to direct administration of Kelly's prescription by the school, even though Kelly's higher dosage is necessary to treat her effectively, Kelly suffers no side effects, and no studies show whether higher dosages are harmful. Instead, the school board offered several alternatives, including alteration of Kelly's class schedule to permit early dismissal and home administration of both of Kelly's doses, or administration of Kelly's afternoon dose at school by one of her parents or someone designated by them.

Unhappy with the school district's stance, the DeBords brought this action alleging the school district's refusal violates section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994); Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131-12165 (1994); and 42 U.S.C. § 1983 (1994). The district court granted summary judgment to the school district. The district court concluded the school district's refusal was not based on Kelly's disability, but on the district's policy stemming from concerns about potential harm to students and liability. The district court also concluded the school district reasonably accommodated the DeBords.

We review the grant of summary judgment de novo. *See Smith v. City of Des Moines*, 99 F.3d 1466, 1468 (8th Cir. 1996). We affirm if the record, viewed in the light most favorable to the

DeBords, shows there is no genuine issue of material fact and the school district is entitled to judgment as a matter of law. *See id.* at 1469. Before we turn to the DeBords' contentions, we examine the discrimination law that guides us.

Both the Rehabilitation Act and the ADA prohibit discrimination on the basis of disability. The Rehabilitation Act provides: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a) (1994). Under regulations implementing the Rehabilitation Act, a recipient of federal funds "that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person," 34 C.F.R. § 104.33(a) (1996), including "the provision of regular or special education and related aids and services," *id.* § 104.33(b)(1). A recipient must give disabled students an equal opportunity to participate in nonacademic and extracurricular services, including health services. *See id.* § 104.37(a). The Rehabilitation Act requires a recipient of federal funds to provide "an otherwise qualified handicapped individual . . . with meaningful access to the benefit that the grantee offers." *Alexander v. Choate*, 469 U.S. 287, 301 (1985). To assure meaningful access, the grantee may have to make reasonable accommodations in its program or benefit. *See id.* & n.21; *Alexander v. Pathfinder, Inc.*, 91 F.3d 59, 62 (8th Cir. 1996); *Lloyd v. Housing Auth.*, 58 F.3d 398, 399 (8th Cir. 1995).

After the Rehabilitation Act had been law for several years, Congress enacted the ADA. Title II of the ADA, applicable to public entities including public schools, states that "no qualified individual with a disability shall, by reason of such disability, . . . be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such

entity." 42 U.S.C. § 12132 (1994). Title II regulations require a public entity to "make reasonable modifications in policies . . . when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service." 28 C.F.R. § 35.130(b)(7) (1996). Congress intended Title II and its implementing regulations to be consistent with the Rehabilitation Act and its regulations. *See Pottgen v. Missouri St. High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994); *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459-60 (6th Cir. 1997) (*en banc*); *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727-28 (10th Cir. 1996). To succeed on their claims under either Act, the DeBords must show the school district refused to administer Kelly's medication because of her disability. *See Davis v. Francis Howell Sch. Dist.*, 104 F.3d 204, 206 (8th Cir. 1997); *McPherson*, 119 F.3d at 460.

The DeBords argue the school district's refusal to provide the nonacademic service of drug administration denies Kelly a free appropriate education because without her full dosage of Ritalin, she cannot benefit from the school's educational program. *See* 34 C.F.R. §§ 104.33(a), .33(b)(1) (1996). The administrative agency charged with enforcing the Rehabilitation Act in school districts has held that when a "handicapped student[] requires the administration of medication in order to benefit from his or her educational program, the [school district] is obligated to ensure that the medication is administered." *Berlin Brothersvalley (PA) Sch. Dist.*, OCR Region III, 353:124 (Dec. 23, 1988). The agency concluded the Berlin district's policy granting school officials unspecified discretion to decline administration of medication and requiring the student's parents to release the district from liability violated 34 C.F.R. §§ 104.33(a) and (b)(1). The DeBords rely heavily on this agency interpretation, and say we must give it substantial deference. *See Blum v. Bacon*, 457 U.S. 132, 141 (1982).

Unlike the drug administration policy in *Berlin*, the policy here contains an objective standard limiting administration of prescription medication only when the prescription exceeds the maximum dosage recommended in the PDR. There is no evidence that the school district had disabilities in mind when formulating or implementing its policy. The DeBords do not question the truthfulness of the school district's expressed motivations of fear of student harm and potential liability. Instead, the DeBords say the fears are invalid. Whether or not ill-founded, however, the school district's fears are unrelated to disabilities or misperceptions about them. The policy is neutral; it applies to all students regardless of disability. A student's excess prescription, not the student's disability, prevents the student from receiving medication from the school nurse. *See McPherson*, 119 F.3d at 460-61. Although Kelly requires Ritalin to treat her disability, it is undisputed that the reason for Kelly's high dosage is probably her metabolism, not the severity of her disability. Kelly's own doctor and others stated the amount of Ritalin needed to treat ADHD is unrelated to the severity of the disorder in any particular patient. Thus, the policy does not discriminate against the severely disabled, as the DeBords assert.

The DeBords argue Kelly was treated differently than other students, but students who received their medication at school did not have prescriptions exceeding the PDR's recommended daily dosage. It is undisputed that the school district did not knowingly administer prescription drugs to any student, disabled or not, in excess of the PDR's recommendation. Disparate treatment is not the only way to prove unlawful discrimination, but the record here offers no other basis to infer the school board's actions were based on Kelly's disability. *See Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 824 n.7 (8th Cir. 1997). The DeBords have not tried to show the policy has the effect of discriminating against the disabled or the severely disabled. On the record here, the school board's facially neutral

policy does not distinguish between those who will receive their full prescription dose and those who will not on the basis of any trait that the disabled or severely disabled are less or more likely to possess. *See Choate*, 469 U.S. at 302 (rejecting Rehabilitation Act claim that state's fourteen-day limit on Medicaid services had disparate impact on the disabled). In other words, the DeBords have not shown disabled students are more likely than nondisabled students to require prescription dosages exceeding the PDR's recommendation. Although Congress was concerned about the discriminatory effects of "overprotective rules and policies" on the disabled, 42 U.S.C. § 12101(a)(5), nothing here suggests the policy or its application has the purpose or effect of discriminating against disabled students.

The DeBords also rely on 42 U.S.C. § 12182(b)(2)(A)(ii), a Title III statute defining discrimination to include the failure to make reasonable modifications in policies. The DeBords assert the school district's failure to waive its policy for Kelly violates this statute. Title III of the ADA applies to private entities providing public accommodations, however, not to public entities. *See* 42 U.S.C. §§ 12181-82; *Sandison*, 64 F.3d at 1036. Entities subject to Title III include private schools, but not public ones. *See* 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104. It is unclear whether § 12182(b)(2)(A)(ii) from Title III applies in a Title II case. *See* 1 Henry H. Perritt, Jr., *Americans with Disabilities Act Handbook* § 5.3, at 201-02 & n.21 (3d ed. 1997) (preamble to ADA regulations says Title II intends to incorporate only those provisions of Titles I and III that are consistent with Rehabilitation Act regulations); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 47 (2d Cir. 1997) (Heaney, J., sitting by designation) (ADA's legislative history states Title II's prohibitions are to be identical to prohibitions of Titles I and III; no intent to excuse similar discriminatory conduct by public entities). Title II does not define discrimination as including the failure to make reasonable modifications, but a Title II regula-

tion states a public entity must make reasonable modifications in policies when necessary to avoid discrimination. *See* 28 C.F.R. § 35.130(b)(7) (1996); *see also Weinreich v. Los Angeles County*, 114 F.3d 976, 978-79 (9th Cir. 1997) (absent discrimination on basis of disability, no duty under this regulation to make reasonable modifications). On the other hand, public entities discriminate in violation of the Rehabilitation Act if they do not make reasonable accommodations to ensure meaningful access to their programs. *See Choate*, 469 U.S. at 301.

We need not resolve whether 42 U.S.C. § 12182(b)(2)(A)(ii) applies in a Title II case, or whether a reasonable modification or accommodation requirement applies absent a separate showing of discrimination. Even if either or both apply, we believe the school board's proposals to establish workable schedules so Kelly's family can give her the prescribed dosages of Ritalin satisfy these requirements, and anyway, the waiver requested by the DeBords is not a reasonable modification or accommodation. There is no precise reasonableness test, but an accommodation is unreasonable if it either imposes undue financial or administrative burdens, or requires a fundamental alteration in the nature of the program. *See Pottgen*, 40 F.3d at 930; *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995). Although the school district has not made the assertion, adjudication of waiver requests would impose an undue administrative burden on the school district to verify the safety of an excess dosage in each individual case. *See Pottgen*, 40 F.3d at 931. At this time, no one knows what the long term effects of high doses of Ritalin might be. A waiver of liability might not be effective, and statutory immunity might not apply. These concerns may be speculative, but they are not unreasonable. Significantly, the school district is not preventing Kelly from receiving the medicine she needs for learning. The school district offered to alter Kelly's class schedule to permit home administration of Kelly's medicine, or to allow Kelly's parents or their designee to

administer her medicine at school. Kelly's parents are able to give Kelly her schooltime dose. Like the district court, we conclude the school district reasonably accommodated Kelly's ADHD as a matter of law.

Because the school district did not discriminate against Kelly on the basis of her disability as a matter of law, the district court properly granted summary judgment to the school district on the DeBords' Rehabilitation Act and ADA claims. The failure to show a violation of the Rehabilitation Act or the ADA dooms the DeBords' § 1983 claims based on those federal laws. *See Hoekstra v. Independent Sch. Dist. No. 283*, 103 F.3d 624, 626 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1852 (1997); *Pottgen*, 40 F.3d at 931. The DeBords' § 1983 claim based on a violation of the Fourteenth Amendment's Equal Protection Clause also fails. The DeBords did not show the school district treated Kelly differently from other children with prescriptions exceeding the PDR's recommended dosage, and the school district's refusal to administer the excess dose is rationally related to the legitimate state interest of protecting students' health. *See Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994).

We affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:96-CV-634 (CEJ)

ALLEN DEBORD, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE FERGUSON FLORISSANT SCHOOL DISTRICT, et al.,

MEMORANDUM

[Filed: November 26, 1996]

This matter is before the Court on the cross motions of the parties for summary judgment. *See* Fed. R. Civ. P. 56.

The plaintiffs[1] bring this action pursuant to Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12131 *et seq.*; § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; and 42 U.S.C. § 1983, seeking damages and injunctive relief[2] requiring the defendants to administer medication to Kelly DeBord ("Kelly") in the amount and at the time prescribed by her physician. The plaintiffs allege that Kelly is a qualified individual with a disability within the meaning of Title II and § 504 of the Rehabilitation Act. They claim that the defendants are discriminating against Kelly based on her disability by depriving her of non-academic services otherwise pro-

[1] Plaintiffs Allen DeBord and Debra DeBord bring this action individually and as next friends of their daughter Kelly DeBord.

[2] On April 4, 1996, the Court denied the plaintiffs' motion for a temporary restraining order. On May 29, 1996, the Court denied the plaintiffs' motion for a preliminary injunction.

vided to non-disabled and less-severely disabled students. The plaintiffs further claim that defendants' actions violate plaintiffs' due process and equal protection rights under the Fourteenth Amendment to the United States Constitution.

At the time the complaint was filed Kelly was a first grade student at Robinwood Elementary School in the Ferguson-Florissant School District. Kelly has been under the care and treatment of Dr. Sheldon Kessler since birth. In 1993, Dr. Kessler diagnosed Kelly with a severe case of Attention Deficit Hyperactivity Disorder ("ADHD"). Dr. Kessler treated Kelly's ADHD with sustained release Ritalin SR ("SR"). Dr. Kessler prescribed a 100 mg dosage of SR to be administered to Kelly when she arises in the morning and an additional 40 mg dosage to be given in the afternoon. Just prior to February 14, 1996, Dr. Kessler, in order to ensure that an effective level of SR remained in Kelly's system, moved the afternoon dosage to 3:00 p.m., before Kelly's school day ended. On February 15, 1996, Joyce Dreimeier, a school nurse at Robinwood, informed Kelly's mother, Debra DeBord, that she would not administer the 3:00 p.m., 40 mg dosage of SR to Kelly because this dose combined with Kelly's morning dose exceeded the daily recommended dosage of 60 mg set forth in the Physician's Desk Reference 1996.[3] On March 8, 1996, Dreimeier contacted Dr. Kessler about his prescribed dosage of SR. Dr. Kessler confirmed the correctness of the dosage and timing of Kelly's medication.

On March 13, 1996, the DeBords attended a Ferguson-Florissant Board of Education meeting and requested that the school nurse administer the 3:00 p.m. dose to Kelly. On March 21, 1996, Shirley Salmon, assistant superintendent, informed the

[3] District policy 3050 provides that the school nurse may determine, based on her professional judgment, whether a prescribed medication should be administered at school. The policy states that physician prescribed medications must be "cleared with the school nurse before being taken while in school."

DeBords by letter that the school would not administer the afternoon does. Nurses in the school district have continued to administer small prescription dosages of Ritalin to approximately 442 other students diagnosed with ADHD.

Although the total daily dosage of SR prescribed by Dr. Kessler is in excess of the range indicated in both the Physician's Desk Reference and in the prescribing information published by the manufacturer, Ciba-Geigy Corporation, no evidence has been submitted showing that Kelly suffers any significant ill effects from this dosage of Ritalin SR.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 474 U.S. 574, 586-87 (1986); Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party may not rest on the allegations of his pleading but must set forth specific fact, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will hear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986).

I. TITLE II and Section 504

The plaintiffs argue that Kelly is being discriminated against in violation of Title II and § 504 because the school refuses to administer her medication while at the same time it administers medication to other students. In response, the defendants argue that the plaintiffs cannot establish a prima facie case of discrimination.

A similar analysis applies to both Title II and § 504 claims. *Pottgen v. Missouri State High School Activities Assoc.*, 40 F.3d 926, 930 (8th Cir. 1994). The remedies, procedures and rights are the same under both statutes, and the regulations interpreting Title II must be consistent with § 504 regulations. *Id.* Thus, it is appropriate to consider the Title II and § 504 claims together.

In order to establish a violation of either Title II[4] or § 504[5], the plaintiff must prove: (1) that she has a disability; (2) that she is otherwise qualified for the benefit in question; and (3) that she was excluded from the benefit due to discrimination solely on the

---

[4] Section 12132 of Title II provides as follows:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 21312.

[5] Section 504 provides, in relevant part, as follows:

> No otherwise qualified handicapped individual . . . shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794.

basis of the disability. *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995); *Gieseking v. Schafer*, 672 F.Supp. 1249, 1262 (W.D. Mo. 1987). An individual cannot be excluded from programs or benefits solely because of the severity of his or her disability. *Conner v. Branstad*, 839 F.Supp. 1346, 1356 (S.D. Iowa 1993). As part of the "otherwise qualified" inquiry, the Court must determine whether some "reasonable accommodation" is available to meet the interests of the handicapped person and the service provider. *Lloyd v. Housing Authority of City of Kirksville*, 58 F.3d 398, 399 (8th Cir. 1995); *Doherty v. Southern College of Optometry*, 862 F.3d 570, 575 (6th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989); *Conner*, 839 F.Supp. at 1356. Thus, schools must make reasonable accommodations but do no, however, have to make "fundamental" or "substantial" modifications to their programs. *Alexander v. Choate*, 469 U.S. 287, 300 (1985). An accommodation is not reasonable if it imposes undue financial and administrative burdens or requires a fundamental alteration in the nature of the program. *Kohl v. Woodhaven Learning Center*, 865 F.2d 930, 936 (8th Cir. 1989), *cert. denied*, 493 U.S. 892 (1989)

In their motion, the defendants first argue that Kelly is not disabled within the meaning of Title II and § 504. Under § 504, a handicapped person is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities . . . ." 34 C.F.R. § 140.3(j)(1).[6] The regulation defines a physical or mental impairment as follows

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the

---

[6] The ADA definition of a disability is almost identical to § 504: "the term disability means, with respect to an individual, (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ." 29 U.S.C. § 12102(2).

> following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive , digestive, genitourinary; hemic and lymphatic; skin; and endocrine; or . . . any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

34 C.F.R. 104.3(j)(2)(i). Under the regulations, "learning" is considered a major life activity. 34 C.F.R. 103.3(j)(2)(ii).

According to the United States Department of Labor, ADHD may fall within the § 504 definition of a physical or mental impairment. *See* Sept. 16, 1991 U.S. Department of Labor Memorandum. Whether ADHD is a disability for purposes of Title II and § 504 depends on whether the condition is so severe that it affects a major life activity - in this case, the ability to learn.

The symptoms of ADHD include developmentally inappropriate attention skills, impulsivity and hyperactivity. In support of their motion, the plaintiffs have provided affidavits and other evidence supporting their assertion that Kelly has symptoms of ADHD that effect her ability to learn. According to Mrs. Debord, Kelly is unable to concentrate and, consequently, it is difficult for her to complete homework assignments. Mrs. Debord also states that is not medicated properly, Kelly becomes destructive and argumentative. Dr. Kessler states in his affidavit that Kelly's ADHD causes her to be "unfocused" and "impulsive" which could cause her to seriously injure herself. Furthermore, Dr. Kessler states that without medication it would be difficult for Kelly to comply with her teacher's requests.

The defendants dispute that Kelly's condition affects her ability to learn. In support of this contention, they submitted Kelly's first grade report card showing that she received satisfactory marks. The defendants argue that the report card demonstrates that Kelly's ADHD does not affect her ability to learn.

The defendants fail to recognize, however, that if untreated Kelly's ADHD would clearly limit her ability to learn. If a child cannot focus or concentrate and is argumentative and impulsive, her ability to learn would clearly be affected. Based on the foregoing, the Court concludes that the plaintiffs have established that Kelly's condition affects her ability to learn. Consequently, Kelly has a disability for purposes of Title II and § 504.

In order to state a claim under Title II or § 504, the plaintiffs must show that Kelly was denied a service solely on the basis of her disability. *See Gieseking*, 672 F.Supp. at 1263. The defendants are also proscribed from denying a benefit or service solely on the basis of the severity of the disability. *Connor*, 839 F.Supp. at 1356. The plaintiffs argue that the school refused to administer Kelly's medication solely because of the severity of her ADHD. The defendants dispute this and assert that Kelly's medication was not administered because it exceeded the manufacturer's recommended dosage.

The record shows that the school district refused to administer the afternoon does of Ritalin SR to Kelly because doing so would have caused the total daily dosage to exceed the manufacturer's recommendation. The school's refusal was consistent with the district's policy against knowingly administering medication in an amount exceeding the recommended daily dosage. This policy applies to all students receiving prescription medication regardless of whether they have a disability. Based on the present record, it is clear that the school district decided not to administer the dosage, not because of Kelly's ADHD, but because the school was concerned about potential harm[7] to Kelly and about the district's potential liability. Furthermore, it is important to

---

[7] The plaintiffs dispute whether the prescribed dosage of Ritalin is harmful to Kelly. However, the Court need not determine whether or not the dosage is proper. The Could must only determine whether the school's decision not to administer the dosage was based solely on Kelly's disability.

note that the defendants have not attempted to prevent Kelly from taking the prescribed dosage of SR at the prescribed time. Indeed, several reasonable accommodations have been proposed by the defendants which would allow Kelly to receive the dosage at the prescribed time. The proposed accommodations include allowing Kelly's parents or their designee to administer the medication at school or dismissing Kelly early from school to allow her to receive the medication at home.[8] The school district also offered to pay for a second opinion from a pediatric neurologist. These reasonable accommodations would have satisfied the legitimate interest of both the school and the plaintiffs. *See Wagner v. Fair Acres Geriatric Center,* 49 F.3d 1002, 1015 (3rd Cir. 1995). However, Kelly's parents refused all of the accommodations offere

Based on the foregoing, the Court concludes that the decision not to administer Kelly's medication was not based solely on her disability and that the school attempted to provide reasonable accommodations to Kelly. Consequently, because the plaintiffs have failed to establish at least one of the elements of a prima facie case of discrimination, the defendants are entitled to judgment as a matter of law as to the § 504 and Title II claims.

The plaintiffs also allege that the school district failed to comply with notice and other procedural safeguards required by § 504 and Title II. Section 504 regulations require a school district to provide notice "that it does not discriminate on the basis of handicap in violation of section 504." 35 C.F.R. § 104.8[9]. Accepted methods of providing such notice include the "posting of notices, publication in newspapers and magazines, placement of notices in recipients' publications, and distribution of memo-

---

[8] The school offered to alter the class schedule so that early dismissal would not result in Kelly missing any academic classwork.

[9] Title II regulations have a similar notice requirement. *See* 28 C.F.R. § 35.106.

randa or other written communication." 35 C.F.R. § 104.8(a). The defendants provided evidence that they complied with this notice requirement by including the designated language in the school discipline code, mailed to each parent annually, and the school newsletter, published bi-annually. Section 504 regulations also require the school district to develop " a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing . . . and a review procedure." 34 C.F.R. § 104.36. However, these procedures only apply "with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services." *Id.* This provision does not apply to Kelly because the plaintiffs are not challenging any action taken by the district regarding the "identification, evaluation, or educational placement" of Kelly. The district has not taken and the plaintiffs have not requested any such action. In fact, the DeBords declined the district's offer to evaluate Kelly for § 504 eligibility and prepare a § 504 placement plan for her. Consequently, the Court concludes that the defendants did not violate the notice requirements of § 504 or Title II.

II. Section 1983 claims

In Count III, the plaintiffs allege constitutional violations pursuant to 42 U.S.C. § 1983. To state a cause of action under § 1983, the plaintiffs must show (1) that the defendants were acting under color of state law; (2) defendants' actions deprived them of rights protected under the United States Constitution or federal law; and (3) a direct causal link exists between the defendants' actions and the deprivation of the protected rights. *Gentry v. Lee's Summit, Missouri,* 10 F.3d 1340, 1342 (8th Cir. 1993). For purposes of this motion, the defendants concede that they were acting under color of state law. Therefore, the Court's analysis begins with whether the plaintiffs were deprived of a protected right.

The plaintiffs first argue that Kelly was denied access to health services afforded to all other students, and that this action deprived here of rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment.[10]

The Equal Protection Clause prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. As a result, all persons similarly situated must be treated alike. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985). As a general rule, the challenged state action is presumed valid if the classification at issue is rationally related to a legitimate state interest.[11] *Id.* at 440. This standard of review is "highly deferential." *Batra v. Board of Regents of University of Nebraska,* 79 F.3d 717, 721 (8th Cir. 1996).

In the present case, the Court concludes that the plaintiffs have failed to state an equal protection claim. The plaintiffs have not shown that the school district treated Kelly differently from similarly-situated individuals. The record is absent of any indication that the school's policy of refusing to administer medication in dosages exceeding the recommended daily dosage was not applied evenhandedly. There is no evidence that other students received school-administered medication in amounts

---

[10] Although the Court finds no reference to an equal protection claim in the complaint, both parties addressed such a claim in their summary judgment motions and responses. Thus, the Court will do so as well.

[11] A higher level of scrutiny applies if the statute or action classifies individuals on the basis of a suspect class, such as race or national origin, or impinges on a fundamental right. *Id.* However, the handicapped are not considered a suspect class. *Cleburne,* 473 U.S. at 446. Nor have the plaintiffs demonstrated that the refusal of the district to administer Kelly's medication impinges upon a fundamental right. Consequently, the higher level of review does not apply in this case and the district's actions are reviewed under the more lenient "rational basis" standard. *Batra v. Board of Regents of University of Nebraska,* 79 F.3d 717, 721 (8th Cir. 1996).

exceeding the recommended daily dosage while Kelly did not. Furthermore, the school's policy is not irrational or arbitrary. In order to survive rational basis review, the policy must only be rationally related to a legitimate state interest. *See Cleburne*, 473 U.S. at 446. The defendants have articulated two reasons for the policy: to prevent potential injury to the student's health and to prevent the school from incurring liability. The Court concludes that the decision not to administer medication in dosages exceeding the recommended daily amount is rationally related to the district's legitimate interest in protecting the health and well-being of the children it educates. Furthermore, the district has a legitimate interest in minimizing its potential liability when it administers medication or provides any other non-academic service to its students. Based on the foregoing, the Court concludes that the defendants are entitled to judgment as a matter of law on the plaintiffs' equal protection claims.

The plaintiffs next argue that they were denied procedural due process. In response, the defendants argue that the plaintiffs do not have a protected interest in the school's dispensation of medication to Kelly. Furthermore, even if the plaintiffs could establish a protected interest, the plaintiffs were provided with all the process they were due under the Fourteenth Amendment.

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property, without due process of law." U.S. Const. amend XIV. Thus, a procedural due process claim requires a deprivation of a property or liberty interest protected by the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Procedural due process triggered only when plaintiff has a "legitimate claim of entitlement" to a property interest. *Id.* This requires more than a "unilateral expectation" or an "abstract need or desire." *Id.* Protected interests arise from state law or other independent sources. *Id.* Thus, a protected property interest can be created by statute, ordinance, or by an express or implied contract. *Bishop v. Wood*,

426 U.S. 341, 344 (1976); *Perry v. Sindermann,* 408 U.S. 593, 601 (1972).

In this case, the plaintiffs have failed to show that they were deprived of a constitutionally protected property interest. They failed to cite a statute, ordinance, school policy, contract or other source creating a "legitimate claim of entitlement" to the dispensation of Kelly's medication by school personnel. Thus, the plaintiffs have not established that they were denied a benefit protected by procedural due process.

The plaintiffs also argue that they were denied a protected liberty interest without due process of law. Parents have a liberty interest in directing the upbringing of their children. *Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972). This interest extends to the right of parents to make medical treatment decision for their children. *Parham v. J.R.,* 442 U.S. 584, 603-04. In this case, the plaintiffs argue that the defendants denied them their right to make medical treatment decisions for Kelly without due process of law. In support of this argument the plaintiffs cite *Matter of Baby K,* 832 F.Supp. 1022 (E.D. Va. 1993), a clearly distinguishable case in which a hospital sought to withhold ventilator treatment from an infant over the mother's objections. In the present case, the defendants have not attempted to prevent Kelly from receiving the course of treatment chosen by her parents. The defendants have not prevented Kelly from taking her prescribed dosage of Ritalin. As discussed above, the defendants have only refused to administer the medication to Kelly, and have offered to accommodate Kelly and her parents in a manner that would allow her to receive the medication at school, in the prescribed dosage and at the prescribed time. Consequently, the Court concludes that the defendants have not deprived the plaintiffs of a protected liberty interest.

Even assuming that the defendants deprived the plaintiffs of a protected liberty interest, the plaintiffs received all the process

due them under the Fourteenth Amendment. Procedural due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 310, 333 (1976). The opportunity to be heard is a flexible concept and is dependent on the particular circumstances of the situation. *Id.* at 334. In determining what process is due the Court must balance the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the value, if any, of additional procedural safeguards; and the government's interest. *Id.* at 335. In this case, the private interest affected, parental decisionmaking, is an important one. The district's interest in protecting students from potential harm and the district's financial interest in limiting its liability are also important. However, these interests must be evaluated in light of the adequacy of the procedures provided by the district.

In the present case, the plaintiffs had numerous opportunities to influence the defendants' decisions. The plaintiffs submitted to the school, through Dr. Kessler and their previous attorney, requests that the school administer Kelly's medication along with information on Ritalin and Kelly's condition and treatment. The district also conducted its own research on Ritalin. On March 13, 1996, the plaintiffs attended a meeting of the Ferguson-Florissant Board of Education and requested that the school administer Kelly's medication. On March 14, 1996, Mrs. DeBord wrote the president of the school board and provided additional information on Ritalin SR. On March 21, 1996, the plaintiffs were notified in writing that the school would not administer Kelly's medication in the prescribed dosage. The plaintiffs make no specific allegations as to how these procedures were inadequate.[12] Nor do the plaintiffs address the value of any additional

[12] Although the plaintiffs argue that they were denied the procedural safeguards outline in § 504 and Title II regulations, the Court has already concluded that the school complied with the notice and procedural requirements of these statutes.

procedural safeguards. Based on the foregoing, the Court concludes that the plaintiffs were provided with a meaningful opportunity to be heard. Therefore, the defendants are entitled to judgment as a matter of law as to the procedural due process claims.

An appropriate Order will accompany this Memorandum.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 26th day of November, 1996.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4196-CV-634 (CEJ)

ALLEN DEBORD, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE FERGUSON-FLORISSANT SCHOOL DISTRICT, et al.,

ORDER

In accordance with the Memorandum filed herewith this date,

IT IS HEREBY ORDERED that the motion of the plaintiffs for summary judgment is **denied**.

IT IS FURTHER ORDERED that the motion of the defendants for summary judgment is **granted**.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment in favor of the defendants and against the plaintiffs. The plaintiffs shall bear the costs.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 26th day of November, 1996.

(2)

Supreme Court, U.S.
FILED
MAR 11 1998
OFFICE OF THE CLERK

No. 97-1297

In The

Supreme Court of the United States

October Term, 1997

ALLEN DeBORD AND DEBRA DeBORD, Individually and as next friends for Kelly DeBord,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE FERGUSON-FLORISSANT SCHOOL DISTRICT, SHIRLEY SALMON, JOYCE DREIMEIER, and CINDY ORMSBY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS A. MICKES*
ROBERT J. TOMASO
PETER G. YELKOVAC
PEPER, MARTIN, JENSEN, MAICHEL and HETLAGE
720 Olive Street, 24th Floor
St. Louis, MO 63101
Tele: (314) 421-3850
Fax: (314) 621-4834

Attorneys for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

34 pp

RESPONSE TO PETITIONERS' QUESTION PRESENTED

The Question Presented by Petitioners does not accurately reflect the issue in this case. The critical issue in this case is whether, under federal law, a school district nurse must administer prescription drugs to a student in an amount exceeding the recommended and approved dosage, when the nurse sincerely believes the administration of such a dosage would violate her professional ethics and possibly subject her to malpractice and when the administration of such medicine would violate the school district's policy.

TABLE OF CONTENTS

Page

RESPONSE TO PETITIONERS' QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING WRIT 5

I. THE DEBORDS' REQUEST FOR CERTIORARI SHOULD BE DENIED BECAUSE THEIR QUESTION PRESENTED IS INAPPROPRIATE FOR REVIEW BY THIS COURT 5

II. THE DEBORDS HAVE FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI UNDER THE SUPREME COURT'S RULES 8

A. This Case Does Not Involve a Split of Authority Among the Circuits 9

B. The Decisions Below in the Present Case Do Not Conflict with Other Decisions Within the Eighth Circuit 12

C. The Eighth Circuit's Decision in the Present Case Does Not Conflict with the Precedent of the United States Supreme Court 14

D. This Case Does Not Involve An Important Question of Federal Law that has Not Been Settled by This Court 20

III. THE DEBORDS CANNOT IDENTIFY ANY ERROR IN THE APPLICATION OF FACTS OR LAW THAT WOULD JUSTIFY THE COURT'S DECISION TO ACCEPT CERTIORARI 21

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Choate, 469 U.S. 287 (1985)..... 15, 16, 25

Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964).... 23

Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982)..... 12

Bingler v. Johnson, 394 U.S. 741 (1969)..... 9

Braxton v. United States, 500 U.S. 344 (1991)..... 9

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1973)..... 15

Conner v. Branstad, 839 F. Supp. 1346 (S.D. Iowa 1993)..... 25

Cook v. Chrysler Corp., 779 F. Supp. 1016 (E.D. Mo. 1991), *aff'd*, 981 F.2d 336 (8th Cir. 1992)..... 22

D'Amico v. New York State Bd. of Law Examiners, 813 F. Supp. 217 (W.D. N.Y. 1993)..... 22

Davis v. Francis Howell School District, No. 4:96CV789-DJS (E.D. Mo. April 22, 1997), *appeal docketed*, No. 97-2379 (8th Cir. argued Jan. 12, 1998)..... 10, 12, 14, 17

Demarest v. Manspeaker, 498 U.S. 184 (1991)..... 7

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989)..... 7

Feliberty v. Kemper Corp., 98 F.3d 274 (7th Cir. 1996).... 23

Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996)..... 22

TABLE OF AUTHORITIES – Continued

Page

Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996) 22, 23

Holly Farms Corp. v. National Labor Relations Bd., 116 S.Ct. 1396 (1996) 8

International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991) 18, 19, 20

Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883 (1984) 16, 17, 18

Jaffee v. Redmond, 518 U.S. 1 (1996) 9

Kirk v. Mercy Hosp. Tri-County, 851 S.W.2d 617 (Mo. Ct. App. 1993) 24

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 11, 12

Peterson v. Hastings Pub. Sch., 31 F.3d 705 (8th Cir. 1994) 22

Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926 (8th Cir. 1994) 25

Powell v. Nevada, 511 U.S. 79 (1994) 20

Prince v. Massachusetts, 321 U.S. 158 (1944) 23

Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981) 12

Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70 (1954) 14

School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987) 15

Staron v. McDonald's Corp., 51 F.3d 353 (2d Cir. 1995) 25

United States v. Lovasco, 431 U.S. 784 (1977) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. O'Malley, 383 U.S. 627 (1966) 9

United States v. Williams, 504 U.S. 36 (1992) 7

United States v. Zolin, 491 U.S. 554 (1989) 13

Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538 (7th Cir. 1995) 22

Wagner v. Fair Acres Geriatric Center, 49 F.3d 1002 (3d Cir. 1995) 23

Western Pacific R.R. Case, 345 U.S. 247 (1953) 13

Wisniewski v. United States, 353 U.S. 901 (1957) 13

Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19 (1st Cir. 1991) 12

STATUTES AND REGULATIONS

20 U.S.C. § 1400 *et seq.* 16

29 U.S.C. § 794(a) 7

34 C.F.R. § 104.33(a) 7

Mo. Rev. Stat. §§ 335.011-335.096 24

RULES

Sup. Ct. R. 10 ..... 8, 9, 13, 14, 15, 20, 21

PUBLICATIONS

Journal of Child and Adolescent Psychopharmacology, Vol. 1, p. 7, No. 1, 1990 2

Pediatric Psychopharmacology, Vol. 15, p. 191, No. 1, March 1992 2

TABLE OF AUTHORITIES – Continued

Page

Physicians' Desk Reference 1996 ..... 1, 2, 3

Harlan, *Manning the Dikes,* 13 Record of N.Y.C. Bar Ass'n 541 (1958).....11, 13

STATEMENT OF THE CASE

Petitioner Kelly DeBord and her parents (collectively "the DeBords") filed this lawsuit against Respondents Board of Education of the Ferguson-Florissant School District, Shirley Salmon, Joyce Dreimeier, and Cindy Ormsby (collectively "Ferguson-Florissant" or "the School District") seeking to compel Ferguson-Florissant to administer an excessive dose of the drug Ritalin SR[1] to Kelly during school hours. Although Ritalin has not been approved by the United States Food and Drug Administration for use in dosages exceeding 60 milligrams ("mg") per day even for adults, the DeBords demanded that Ferguson-Florissant administer a dosage that would have resulted in Kelly receiving 140 mg of the drug per day. When the nursing staff of the School District refused to administer the drug, the DeBords filed this lawsuit.

Kelly DeBord was, at all times pertinent to this matter, a first-grade elementary school student in the Ferguson-Florissant School District. Kelly was under the care of Sheldon Kessler, M.D. In 1993, Dr. Kessler diagnosed Kelly, at age four years, with Attention Deficit Hyperactivity Disorder ("ADHD").

Dr. Kessler prescribed 140 mg of Ritalin SR per day for Kelly. The prescription provided that the 140 mg dosage be administered at designated times during the day in two separate dosages as follows. Upon rising in

---

[1] Ritalin SR is a time-release medication that, according to recommended guidelines, has a "duration of action for approximately eight hours." *Physicians' Desk Reference* 1996 at p. 848.

the morning, Kelly received 100 mg of the medication at home. Prior to February 15, 1996, Kelly also received 40 mg of Ritalin SR at 3:00 p.m. at school.

On February 15, 1996, Joyce Dreimeier, a Ferguson-Florissant school nurse, informed Kelly's mother that Nurse Dreimeier could not administer the 40 mg dosage of Ritalin SR at 3:00 p.m. because the total daily dosage exceeded the recommended daily dosage of 60 mg set forth in the *Physicians' Desk Reference* ("*PDR*").[2]

It is uncontested that the District has a clear policy regarding the administration of any medication. The policy states that the nurse has the right to refuse to administer medication if, in her reasonable and prudent judgment, the request for medication exceeds the maximum dosage recommended in the PDR or other approved pharmaceutical manuals. The policy also provides that the school nurse may determine, based on her professional judgment, whether a prescribed medication should be administered at school. The policy further states that

---

[2] Nurse Dreimeier refused to administer 40 mg of Ritalin SR to Kelly at 3:00 p.m. because the recommended dosage of Ritalin SR is a *total daily dosage* of 0.3 mg to 2.0 mg per kg of body weight. *Pediatric Psychopharmacology*, Vol. 15, p. 191, No. 1, March 1992; *Journal of Child and Adolescent Psychopharmacology*, Vol. 1, p. 7, No. 1, 1990. According to this formula, the maximum recommended daily dosage of Ritalin SR for a child of Kelly's weight, 40 pounds or 18 kgs, would be approximately 36 mg. Dr. Kessler is currently prescribing 140 mg per day for Kelly, almost three times the highest recommended daily dosage for even an adult and more than four times the recommended dosage for a child of Kelly's weight. Additionally, Dr. Kessler is likely to increase Kelly's dosage as she grows.

physician-prescribed medications must be "cleared with the school nurse before being taken while in school."

Ferguson-Florissant's nurses regularly and without incident administer Ritalin to approximately 442 students with the diagnosis of ADHD or Attention Deficit Disorder ("ADD") each day. However, no School District nurse knowingly administers Ritalin SR in a dosage that exceeds the recommended daily dosage as set forth in the *Physicians' Desk Reference* or in the manufacturer's package insert.

Similarly, the School District's nurses regularly administer other medicines to children with various disabilities and conditions. No School District nurse, however, knowingly administers any medication to any student that exceeds the recommended daily dose as established in the PDR or other approved pharmaceutical manuals. Indeed, on at least one prior occasion, a School District nurse refused to administer a physician-prescribed dose of arsenic to a student.

On March 13, 1996, the DeBords attended a meeting of the Board of Education of the Ferguson-Florissant School District ("Board") to challenge the nurse's decision not to administer Kelly's Ritalin. The DeBords requested that the Board review the school nurse's decision not to administer 40 mg of Ritalin SR at 3:00 p.m. to Kelly.

Ferguson-Florissant shortly thereafter informed the DeBords that the Board had decided to support the nurse's decision not to administer 40 mg of Ritalin SR to Kelly at 3:00 p.m. Nurse Dreimeier and other school

officials, however, offered the DeBords numerous reasonable accommodations. *See* footnote 9, *infra*. After the DeBords rejected all of the proposed accommodations, they filed a Complaint in the United States District Court for the Eastern District of Missouri seeking injunctive relief and monetary damages.

On April 4, 1996, the District Court heard Plaintiffs' Motion for a Temporary Restraining Order. Following the hearing, the Court denied the Motion and set a hearing on Plaintiffs' Motion for a Preliminary Injunction.

Following the preliminary injunction hearing, at which the Court heard the testimony of the parties and their designated experts, the District Court orally denied Plaintiffs' Motion for a Preliminary Injunction.

On November 26, 1996, the District Court granted Ferguson-Florissant's Motion for Summary Judgment. The DeBords subsequently appealed to the United States Court of Appeals for the Eighth Circuit. On October 9, 1997, the Eighth Circuit affirmed, in a written opinion, the decision of the District Court. The DeBords then filed their Petition with this Court.

The Court should decline to exercise its discretion to review the well-founded decisions of the courts below. In their Petition to this Court, the DeBords attempt to obfuscate the simple issues in this case of first impression. The DeBords employ diversionary tactics to draw attention from the critical focus of this matter and to avoid answering the relatively simple legal questions that lie at the heart of this uncomplicated case. Accordingly, for the reasons addressed more fully herein, Ferguson-Florissant

respectfully requests that the Court deny the DeBord's Petition.

REASONS FOR DENYING WRIT

I. THE DEBORDS REQUEST FOR CERTIORARI SHOULD BE DENIED BECAUSE THEIR QUESTION PRESENTED IS INAPPROPRIATE FOR REVIEW BY THIS COURT.

The Question Presented for Review by the DeBords is inappropriate for this Court's consideration because it does not properly reflect either the decision of the District Court or the Eighth Circuit below. In the DeBords' Petition, the sole Question Presented for Review is as follows:

> Do speculative concerns about harm to the student and liability to school district personnel **excuse** a school district from its obligations under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act to make reasonable modifications of its policies in order to accommodate a student's disability?

Petition at ii (emphasis added).

As reflected in the DeBords' Statement of the Case, the District Court held that although Kelly's condition constituted a disability under the applicable statutes, Ferguson-Florissant's decision not to administer the excessive dose of medication prescribed was a non-discriminatory decision based on a facially neutral and uniformly applied policy. Petition at A-16. The District Court also held that Ferguson-Florissant complied with

both Section 504 and ADA by offering to make reasonable accommodations. *Id.* at A-17. The District Court did not hold, either expressly or by implication, that the school district was **excused** from its obligations under either Act.

Likewise, the Eighth Circuit held that the policy in question did not discriminate based upon Kelly's disability, Petition at A-7, and that the School District satisfied its obligations to reasonably accommodate Kelly's disability. Petition at A-8. Contrary to the DeBords' misleading Question Presented, the Eighth Circuit, like the District Court, never intimated that the School District was **excused** in any way from complying with Section 504 or the ADA.

Even a cursory review of the Statement of Issues in the DeBords' brief before the Eighth Circuit clearly demonstrates that the Question Presented for Review in this Petition was never presented for consideration to the Eighth Circuit.[3]

---

[3] The Statement of Issues as set forth in the DeBords' appellate brief reads as follows:

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT THE PLAINTIFF WAS NOT DISCRIMINATED AGAINST BASED ON HER DISABILITY.

II. THE DISTRICT COURT ERRED IN RULING THAT THE PLAINTIFF WAS OFFERED REASONABLE ACCOMODATIONS TO HER DISABILITY.

III. THE DISTRICT COURT ERRED IN RULING THAT THE SCHOOL DISTRICT'S POLICY WAS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

Hence, the DeBords' Question Presented for Review is not properly before this Court.

It is undisputed that a school district has two obligations under the ADA and Section 504. First, a school district may not discriminate against a student on the basis of the student's disability. Second, a school district must offer to reasonably accommodate the disability of a student so that the student may participate fully in the programs and services of the school district, unless to do so would fundamentally alter a program. *See* 29 U.S.C. § 794(a); 34 C.F.R. § 104.33(a). At no point in the proceedings below did Ferguson-Florissant contest these two explicit statutory requirements. The courts below clearly found, in an application of the law to the undisputed facts, that Ferguson-Florissant had satisfied its statutory mandates as a matter of law.

Having lost on the grounds presented to the District Court and the Eighth Circuit, the DeBords attempt to take another bite at the apple by reframing their argument in the Question Presented to this Court. Traditional Supreme Court practice, however, precludes the grant of certiorari when the argument in support of certiorari was not raised in the courts below and, thus, not pressed or passed upon by the courts below. *United States v. Williams*, 504 U.S. 36, 43 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 189 (1991); *DeShaney v. Winnebago County Dep't*

IV. THE DISTRICT COURT FAILED TO ADDRESS ALL OF APPELLEE'S [SIC] SECTION 1983 CLAIMS BASED ON DEPRIVATION OF RIGHTS UNDER FEDERAL STATUTES.

of Soc. Servs., 489 U.S. 189, 195 n.2 (1989); *United States v. Lovasco*, 431 U.S. 784, 788 n.7 (1977). Absent exceptional circumstances, this Court will not review an argument not raised below. *Id.*

Because the DeBords did not present to the courts below the question presented to this Court, such question could not have served as the basis for the decisions by either the District Court or the Court of Appeals. *Holly Farms Corp. v. National Labor Relations Bd.*, 116 S.Ct. 1396, 1402 n.2 (1996). A brief examination of the lower courts' decisions in this matter confirms this fact. The DeBords simply have presented an improper question to this Court for review. Thus, certiorari should be denied.

II. THE DEBORDS HAVE FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI UNDER THE SUPREME COURT'S RULES.

Even if they had correctly stated the appropriate question for review, the DeBords have patently failed to demonstrate that this case is exceptional such that it merits the review of the Supreme Court. Supreme Court Rule 10 states that, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 further sets forth several circumstances under which certiorari may be proper. *Id.* Not only have the DeBords failed to identify any such circumstances in support of their request for certiorari, they also have failed to set forth any compelling reasons that militate in favor of the granting of certiorari. Indeed, the DeBords merely hint at two such circumstances in support of their Petition, and

these two circumstances are conspicuously absent in this case.

A. This Case Does Not Involve a Split of Authority Among the Circuits.

The DeBords' implication that this case involves a split of authority among the United States courts of appeals is erroneous. Under Rule 10, certiorari may be considered where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

The type of conflict required between circuit courts in order to warrant certiorari is a **direct** conflict regarding a specific issue of law. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1 (1996) (certiorari granted to resolve conflict between several Circuits regarding whether federal courts should recognize a psychotherapist-patient privilege under the Federal Rules of Evidence); *Bingler v. Johnson*, 394 U.S. 741, 747-48 (1969) (certiorari granted to resolve conflict between Third Circuit's ruling and ruling by the Fifth Circuit regarding validity of a treasury regulation); *United States v. O'Malley*, 383 U.S. 627, 630-31 (1966) (certiorari granted to resolve conflict between Seventh Circuit's decision and a previous ruling by the First Circuit regarding whether to exclude from a taxable estate the portion of the trust principal representing accumulated income and order an appropriate refund); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (certiorari granted to resolve conflict between the Fourth Circuit's decision below and that of the Second and Fifth Circuits regarding whether a "stipulation" in a plea agreement must be part

of the "quid pro quo" for the government's agreement not to charge a higher offense). The case at bar simply does not present any circuit decision in direct (or even indirect) conflict with any other circuit on the specific issue in this case.

The School District's exhaustive research has revealed no previous cases in any federal court which have addressed the specific issue in this litigation. The DeBords have also been unable to cite to any such case.

Further, only one other case could be found which has raised this same issue since the present action was filed, *see Davis v. Francis Howell School District*, No. 4:96CV789-DJS (E.D. Mo. April 22, 1997), *appeal docketed*, No. 97-2379 (8th Cir. argued Jan. 12, 1998). The *Davis* case involves the same counsel who represent the parties in the present litigation, and involves the same physician, Dr. Kessler, and the same issue. *Davis* is currently pending decision in the same circuit that decided the present case. *Id.* Because the present dispute is a case of first impression, the Eighth Circuit's ruling cannot possibly conflict with any other circuit on this matter.[4]

---

[4] Indeed, the DeBords have previously admitted in a number of pleadings to the Eighth Circuit that this case is one of first impression in the circuit. In particular, the DeBords asserted in *Appellants' Motion to Reconsider Denial of Renewed Request for Oral Argument and Suggestions in Support* that "[t]he pleadings of both sets of parties, in the instant appeal and in the similar *Davis* case, have stated time and again that these cases raise complex issues of law of **first impression** in this Circuit." Likewise, the DeBords asserted in *Appellants' Renewed Request for Oral Argument and Motion to Consolidate* that "[t]he pleadings of the parties in the instant appeal and the *Davis* [sic] have

Moreover, this Court should not be inclined to grant certiorari concerning an issue that is unlikely to recur.

The DeBords' citation to several decisions from district courts[5] and circuit courts of appeals in an attempt to raise a split of authority between the circuits is similarly unavailing. None of the decisions cited by the DeBords is on point. As this Court has observed in the past when denying certiorari, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a **real embarrassing conflict of opinion and authority** between the circuit court of appeals." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (emphasis added).

None of the circuit court cases cited by the DeBords conflicts with the decision of the Eighth Circuit on the same legal question of whether a school district nurse must administer prescription drugs in an amount exceeding the recommended and approved dosage. Certainly,

---

stated that the cases raise complex and novel issues of law of **first impression** in this Circuit. Once again, the DeBords cited as support for *Appellants' Request for Additional Time to File Opening Brief* the fact that "[b]oth cases raise **multiple and complex issues** of **first impression** in this Circuit . . . " (emphasis added).

[5] A conflict between a decision of a district court and that of a court of appeals is generally not a sufficient ground to warrant the granting of certiorari. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958) (only "in very rare instances, will a conflict between a decision of the Court of Appeals and that of a district court in some other circuit suffice.").

the present case does not present a "real embarrassing conflict of opinion and authority" between the circuits as required by the Supreme Court. *See id.*

Even a cursory examination of the cases cited by the DeBords reflects the absence of any conflict between the circuits. *Compare Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 22-23 (1st Cir. 1991) (court concluded that university had failed to meet its duty of seeking reasonable accommodation); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 622 (9th Cir. 1982) (court analyzed risk of future injury in context of work related injuries); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1383 (10th Cir. 1981) (focus is on whether university discriminated on the basis of handicap, and mere fact that the university acted in a rational manner is not a defense). The DeBords' effort to identify a "split" among the circuits is utterly unsupported and must be flatly rejected.

B. The Decisions Below in the Present Case Do Not Conflict with Other Decisions Within the Eighth Circuit.

The DeBords' contention that the Eighth Circuit's decision in *DeBord* conflicts with other panel decisions within this same circuit must be flatly rejected. Once again, even a cursory examination of the myriad of cases cited by the DeBords illustrates that no split exists within the Eighth Circuit. As explained *supra*, the *Davis* case, presently on appeal before the Eighth Circuit, is the only other case even remotely on point in the Eighth Circuit.

Assuming *arguendo* that the *DeBord* decision actually does conflict with other Eighth Circuit precedent, which

it undoubtedly does not, such a conflict **still** would not warrant the grant of certiorari. *See* Sup. Ct. R. 10(a). Rule 10(a) contemplates a conflict between **decisions of two or more courts of appeals**, and **not** conflicting decisions of panels within a circuit. Rule 10(a); *see Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."); *United States v. Zolin*, 491 U.S. 554, 561 (1989) (full Ninth Circuit Court of Appeals vacated panel opinion and ordered en banc review, on the basis of perceived conflict between two earlier Ninth Circuit opinions and upon limited en banc review, Court concluded that intracircuit conflict was illusory).[6]

Such conflict is best resolved by the court of appeals itself, sitting en banc. *See generally Western Pacific R.R. Case*, 345 U.S. 247, 273 (1953) (Jackson, J. dissenting) ("[i]n cases of intracircuit conflict or other exceptional circumstances, which actually demand the full attention of the court, the judges of a court should be trusted to convene on their own initiative.").

---

[6] *See* Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958) ("Likewise, contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.").

C. The Eighth Circuit's Decision in the Present Case Does Not Conflict with the Precedent of the United States Supreme Court.

As a further example of their scatter-shot attempt to convince this Court to take review of this case, the DeBords imply that this case involves a decision by a United States court of appeals on an important federal question that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10(c). This argument must fail.

First, the federal question involved in this case is not "important" such that it would fit within the confines of Rule 10(c). This case of first impression surely does not constitute an "important matter" as contemplated by Rule 10. Interpreting a previous version of Rule 10, this Court held that in order to justify the granting of certiorari, a case must present an issue that reaches to a problem "beyond the academic or episodic." Sup. Ct. R. 17 (renumbered as Rule 10, Jan. 1, 1990); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1954) (interpreting Rule 17). As the Court explained in *Rice*, "this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Id.* Under this reasoning, the present case is plainly insufficient for review by this Court.

A decision by the Supreme Court in this case, pursuant to the Court's standards, would be of interest only to the parties in this case, the parties in *Davis*, and those with a purely academic interest in the issue. Hence, this case obviously does not "reach beyond the academic or the episodic." Indeed, as Justice Stewart once wrote:

> The only remarkable thing about this case is its presence in this Court. For the case involves no

> more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties].

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 189 (1973) (dissenting opinion). Justice Stewart's admonition is particularly applicable to the present case. The case at bar presents no special or important reason for this Court to accept review under Rule 10(c).

Moreover, and of equal importance, this case does not conflict with relevant decisions of this Court. The DeBords cite a litany of decisions by the Supreme Court in another unfocused attempt to raise a conflict between Supreme Court precedent and the Eighth Circuit's decision below.[7]

Once again, however, the decisions cited by the DeBords are based on facts far removed from those present in the instant case. Moreover, some of the decisions cited are based on entirely different statutory schemes inapplicable to this case.

The DeBords maintain that this Court's ruling in *Alexander v. Choate*, 469 U.S. 287, 299 (1985), is one such conflict. The *Alexander* case, however, did not address

---

[7] The Eighth Circuit's decision in *Debord* conforms with the pronouncement of *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 284 (1987). As discussed above, Respondents administer Ritalin to hundreds of students daily. Moreover, in the *Nassau County* case, the Court explicitly questioned whether courts should "defer to the reasonable medical judgments of private physicians" when determining whether a person is otherwise qualified for the job. *Id.* at 288 n.18.

Section 504 in the context of disabled students. Rather, that case involved a state reduction in Medicaid benefits and assumed that Section 504 was applicable to at least some of the disparate impact claims at issue in that case. *Id.* at 299.

The DeBords cite *Alexander* for the proposition that Section 504 requires the school district, not the disabled student, to reasonably modify its policies to provide meaningful access to its programs and services. *Id.* at 301 n.21. The DeBords contend that the School District failed to reasonably modify its policy to provide Kelly with meaningful access to its health services. The Eighth Circuit, however, clearly found that the School District's proposals to establish schedules to allow early release of the student or to allow a designee of the DeBords to administer the medication at school (in the prescribed dosage) satisfied the requirements of Section 504. Petition at A-8. Thus, Ferguson-Florissant cannot fathom the manner in which *Alexander* conflicts with the decisions of the courts below in the case at bar.

Moreover, the DeBords' reliance on cases brought under the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, to support the contention that Respondents are obligated to administer mega-doses of Ritalin to a student is similarly misplaced. For example, a review of the DeBords' brief, without reading the cases cited therein, might lead one to conclude that the *Tatro* case involved facts identical to the present case. *Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). The DeBords, however, strategically omitted the fact that Kelly DeBord has never been identified as a student with an IDEA disability who qualifies for IDEA educational services.

Further, the DeBords did not bring this instant action pursuant to that statute. Therefore, the DeBords cannot rely upon case law interpreting the IDEA, a complex statutory scheme distinct from the ADA and Section 504, in support of their cause of action.

In quoting *Tatro*, the DeBords conveniently omit the term "CIC" (i.e., clean intermittent catheterization), leading the reader to believe that the risks discussed by this Court in that case stemmed from a school nurse's administration of medication to a student. *Id.* at 893 n.12. The issue before the Court in *Tatro* concerned whether the services requested were "medical services" **under the IDEA,** which are excluded from services which a school district must provide to comply with that particular statutory scheme. Indeed, the DeBords cannot dispute that the medical services exclusion at issue in *Tatro* is unique to the IDEA. The DeBords have cited no authority establishing that the holding or reasoning in *Tatro* applies to the instant case.

Even if *Tatro* were relevant to the present case, which it certainly is not, the DeBords' cause of action does not focus on the question of whether the administration of medication at a level several times higher than that allowed by the FDA is a service that must be provided by the School District. As explained above, Respondents administer medication to hundreds of students daily. The issue here, which is unique to this case and *Davis*, is whether Respondents must administer medication at levels in excess of the maximum approved dosage when the School District nurse sincerely and honestly believes, in the exercise of her professional judgment, that such administration would violate her professional ethics and

possibly subject her to malpractice, and when the administration of such medication violates the School District's policy. Accordingly, this Court's decision in *Tatro* is inapplicable to the present facts.

The DeBords' inability to identify a true conflict in this case is further illustrated by their citation to *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). That case is cited as support for the DeBords' contention that the School District may not hide behind speculative fears of harm and liability to avoid its obligation to reasonably modify its drug administration policy. *International Union*, however, is factually and legally inapposite to the present case. In *International Union*, the challenged policy barred pregnant women from working in positions involving lead exposure **exceeding** federal standards. In other words, the employer in *International Union* attempted to "raise the bar" above that mandated by federal guidelines. Unlike the OSHA guidelines in *International Union*, federal regulations in the present case do not establish "dosage" levels in a manner akin to the "lead" levels at issue in *International Union*.

In the instant case, the School District is certainly not attempting to raise the bar above that established under federal regulation or statute.[8]

---

[8] Moreover, the *International Union* decision is inherently predicated upon the ability of an adult employee to place herself into a position in which she voluntarily assumes the risk. Unlike the adult in *International Union*, Ferguson-Florissant in the case at bar cannot be assured that Petitioner student has either the capacity or ability to consent to the administration of medication to her in a manner that exceeds medically recognized norms.

Federal law prohibits the Respondents from discriminating against students with disabilities, in accordance with the standards articulated above. Further, as explained more fully below, the School District has undoubtedly satisfied its obligations under federal law by offering to accommodate Kelly's disability. Unlike the employee in *International Union,* Kelly is not precluded from attending school or from receiving her desired level of medication.

In addition, the *International Union* decision does not contemplate the critical presence of a professional nurse's ethical requirements **or** state statutory mandates. The *International Union* case certainly does not excuse a professional from observing her ethical obligations and absolutely does not address the existence of statutory mandates governing the professional's conduct. The only issue in this case is whether it is a reasonable accommodation to force an independently licensed health care provider, such as a school nurse, to blindly follow a prescription of a doctor.

Finally, unlike the DeBords' request in the instant case, the *International Union* policy did not require the defendant to take affirmative steps that potentially could endanger either the plaintiff or the defendant. The *International Union* policy **proscribed** the plaintiff from performing certain jobs. This reasoning cannot be exported to the present case, wherein the DeBords seek to force a School District to **affirmatively administer** a legally controlled substance to a child in a dosage that is professionally questionable and potentially damaging. Indeed, Kelly still attended school and received her medication.

Thus, the DeBords' reliance upon *International Union* is inapposite to the instant case.

D. This Case Does Not Involve An Important Question of Federal Law that has Not Been Settled by This Court.

The DeBords' only other possible avenue to review by this Court is to demonstrate that the Eighth Circuit has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10. However, as explained more fully above, this case does not present any unusually important question of federal law.

Thus, this case presents no issue involving a split of authority in the circuit courts of appeals. This case also presents no important Eighth Circuit decision which conflicts with previous decisions of this Court. Finally, this case poses no important question of federal law that should be decided by this Court. This case simply presents no issue which reaches beyond the academic or episodic. Granting certiorari in this case would be an inefficient and ineffective use of judicial resources because this Court would be reaffirming, without revisiting, well-settled law. *See Powell v. Nevada*, 511 U.S. 79, 86 (1994) (Thomas, J., dissenting). For these well-founded reasons, the Petition for Writ of Certiorari should be denied.

III. THE DEBORDS CANNOT IDENTIFY ANY ERROR IN THE APPLICATION OF FACTS OR LAW THAT WOULD JUSTIFY THE COURT'S DECISION TO ACCEPT CERTIORARI.

The DeBords' attempt to invoke this Court's review of the substantive merits of the decisions below cannot be countenanced. In their Petition, the DeBords attempt to argue the actual merit of their claims to this Court. This action is futile under Supreme Court Rule 10. Rule 10 unambiguously states that a writ of certiorari is rarely well taken "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10(c).

Although the DeBords attempt to convince this Court that a factual dispute exists as to whether the accommodations offered were reasonable, this transparent attempt must fail. The record below indisputably reflects that Ferguson-Florissant offered numerous, distinct accommodations to the DeBords in an attempt to reasonably accommodate Kelly's disability.[9]

---

[9] It is undisputed that Ferguson-Florissant offered the following accommodations to the DeBord family: (1) Kelly would receive early dismissal (only twenty minutes would suffice) from school; (2) Kelly would be allowed to arrive late to school (again, by only twenty minutes); (3) Ferguson-Florissant would alter Kelly's class schedule to ensure that her non-academic classes would be scheduled at the beginning or the end of the school day, so that Kelly would not miss any academic work if her parents elected alternative arrival and departure times; (4) Kelly's parents or their designee could come to the school and administer the medication at 3:00 p.m.; (5) Ferguson-Florissant would work with Dr. Kessler to alter the timing or the amount of the dose of Ritalin; and (6) Ferguson-Florissant would pay for a second opinion from a pediatric neurologist.

It is uncontested that the DeBords rejected *all* of these offers. The DeBords have insisted throughout the course of this litigation that the *only* accommodation acceptable to them is to require the School District to administer 40 mg of Ritalin SR to Kelly at 3:00 p.m. Essentially, the DeBords' unwavering position is that their proffered accommodation is the **only** legally permissible accommodation.

However, courts uniformly have held that the disability discrimination laws do not require a school district to provide a student with the best accommodation possible or even with her (or her parents') desired accommodation. *See Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 546 (7th Cir. 1995) (citations omitted). The DeBords cannot dispute that under the ADA and Section 504, an accommodation need only be reasonable, not necessarily the accommodation of choice. *See Peterson v. Hastings Pub. Sch.*, 31 F.3d 705 (8th Cir. 1994); *Hankins v. The Gap, Inc.*, 84 F.3d 797, 800-01 (6th Cir. 1996); *Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996); *D'Amico v. New York State Bd. of Law Examiners*, 813 F. Supp. 217 (W.D. N.Y. 1993).

Moreover, even though the DeBords rejected each and every accommodation suggested by Ferguson-Florissant, the DeBords presented no evidence below to establish that the offered accommodations were unreasonable. Hence, the DeBords simply cannot now complain that they were not afforded reasonable accommodations. *See Cook v. Chrysler Corp.*, 779 F. Supp. 1016, 1023-24 (E.D. Mo. 1991), *aff'd*, 981 F.2d 336 (8th Cir. 1992) (reasonable accommodation requires only good faith effort to meet plaintiff's needs; plaintiff has corresponding duty to

make good faith effort to cooperate in offered accommodation); *Feliberty v. Kemper Corp.*, 98 F.3d 274, 280 (7th Cir. 1996) ("determination of a reasonable accommodation is a cooperative process in which both the employer and the employee must make reasonable efforts and exercise good faith."); *Hankins*, 84 F.3d at 801 (rejection of accommodation offered renders individual unqualified under ADA).

Importantly, as the District Court correctly reasoned, the School District did not "prevent Kelly from receiving the course of treatment chosen by her parents . . . [and did not prevent] Kelly from taking the prescribed dosage of Ritalin." Petition at A-21. Rather, the School District only refused to administer the medication to Kelly. . . . " Petition at A-21. Contrary to the DeBords' implication, parents do not have an absolute right to demand whatever medical treatment they desire for their children. *See Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1008 (D.C. Cir. 1964).

All of the accommodations delineated above would have (and, in fact, have) permitted Kelly to receive the dosage of Ritalin at the levels prescribed by her physician. Moreover, the acceptance of any one of these accommodations by the DeBords clearly "would have satisfied the legitimate interest of both the school and the plaintiffs." Petition at A-17 (citing *Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002, 1015 (3d Cir. 1995)).

During the entirety of these proceedings, the DeBords have failed to recognize one overriding reality in this case. A nurse not only has the right, but also the

obligation, to exercise independent nursing judgment in determining whether to administer a medication.

In Missouri, a nurse is an independently licensed health care professional who may be held liable for her actions. The propriety of a nurse's conduct is governed by the Missouri Nursing Practice Act, Mo. Rev. Stat. §§ 335.011-335.096, and concomitant state regulations. A Missouri nurse may be held civilly *liable* for agreeing to administer a medication in a dosage duly prescribed by a physician. *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617, 622 (Mo. Ct. App. 1993). In short, the public policy of Missouri requires registered nurses to "faithfully serve the best interests of their patients." *Id.*

Hence, Ferguson-Florissant nurses have every right to protect themselves from professional malpractice by not administering medicine beyond the maximum allowable dosage. The instant case is, in large part, about whether a professional nurse in Missouri has any rights whatsoever. If the DeBords would prevail in this case, no school nurse would have the right to inform a physician that she or he refuses to poison a child. Clearly, a professional nurse has the right and obligation to decline to take action with respect to a patient in accordance with professional ethics and statutory requirements.

Although the DeBords criticize the Ferguson-Florissant nurse's judgment as "archaic, discriminatory, and medically unsound," the DeBords provide absolutely no

evidence or authority buttressing this cursory and inflamatory statement.[10]

Again, it appears that the DeBords have adopted this posture because Ferguson-Florissant refused to adopt the only accommodation that the DeBords would accept: i.e., forcing Ferguson-Florissant to violate its medication administration policy and compelling the nurse to contradict her own professional judgment and ethics, as well as her statutory responsibilities, by administering the Ritalin in the manner and at the time demanded by the DeBords.

Further, as the courts below accurately found, requiring Ferguson-Florissant to waive or substantively modify its medication policy in the manner demanded by the DeBords certainly would have, under the present circumstances, constituted an undue burden and a fundamental alteration of an important, facially neutral policy. Hence, this finding serves as yet another, independent reason for judgment in favor of Ferguson-Florissant.

Under clearly established law, an accommodation is not reasonable if it requires substantial modification of existing programs or if it would require fundamental alterations in the nature of such programs. *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994); *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995); *Conner v. Branstad*, 839 F. Supp. 1346, 1355 (S.D. Iowa 1993) (citing *Alexander v. Choate*, 469 U.S. 287,

---

[10] Even if the DeBords' harsh assessment of Nurse Dreimeier is correct, that does not make her conduct discriminatory. Indeed, as the courts below found, the DeBords offered no evidence to show that the School District treated nondisabled students more favorably than their daughter.

299-300 (1985)). It is difficult to imagine a more fundamental alteration of a program than stripping a nurse of her own reasonable judgment and conscience.

Even if Ferguson-Florissant had been unable to demonstrate that the DeBords' requested accommodation was unduly burdensome or a fundamental alteration of a school program, Ferguson-Florissant would still have been entitled to prevail in this lawsuit. As explained more fully above, the DeBords' rejection of numerous reasonable accommodations proposed by Ferguson-Florissant is fatal to the DeBords' claims as a matter of law. Indeed, the lower courts' finding on that issue serves as wholly independent grounds for the entry of judgment in favor of the School District. The DeBords cannot identify any error on the merits by the courts below justifying this Court's review.

CONCLUSION

For each of the reasons set forth in the School District's brief, this Court should deny the DeBords' Petition for Writ of Certiorari.

Respectfully submitted,

THOMAS A. MICKES*
ROBERT J. TOMASO
PETER G. YELKOVAC
PEPER, MARTIN, JENSEN,
MAICHEL and HETLAGE
720 Olive Street, 24th Floor
St. Louis, MO 63101
Tele: (314) 421-3850
Fax: (314) 621-4834

Attorneys for Respondents

**Counsel of Record*

FILED
MAR 25 1998
CLERK

(3)

No. 97-1297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALLEN DEBORD AND DEBRA DEBORD,
INDIVIDUALLY AND AS NEXT FRIENDS
FOR KELLY DEBORD, MINOR,
Petitioners,

VS.

THE BOARD OF EDUCATION OF THE FERGUSON-FLORISSANT SCHOOL DISTRICT, SHIRLEY SALMON, JOYCE DREIMEIER, AND CINDY ORMSBY,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

RECECCA S. STITH*
STEPHEN E. ROTHENBERG
DAYNA F. DECK
Suite One East
6609 Clayton Road
St. Louis, MO 63117
Ph. 314-721-2500
Fax 314-721-0606

Attorneys for Petitioners

* Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

8 pp

REPLY TO RESPONDENTS' RESPONSE TO THE QUESTION PRESENTED

Petitioners' Question Presented is the heart and soul of this case and the very issue on which the Eighth Circuit passed in the decision for which certiorari is sought. Respondents inexplicably contend that the true issue is whether federal law requires a school nurse to administer a prescribed medication to a student when the nurse sincerely believes that doing so would violate her professional ethics, "possibly" subject her to malpractice and when such administration would violate a school district policy. However, neither the Eighth Circuit nor the United States District Court for the Eastern District of Missouri ever passed on the issue of a nurse's right nor rested their respective decisions on such purported right. Once again, the Question Presented, which was fully briefed below and on which the Eighth Circuit passed, is:

> Do Speculative Concerns about Harm to the Student and Liability to School District Personnel Excuse A School District from Its Obligations under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act to Make Reasonable Modifications of Its Policies in Order to Accommodate a Student's Disability?

TABLE OF CONTENTS

Reply to Respondents' Response to the Question Presented i

Table of Contents ii

Table of Authorities iii

Conclusion 4

TABLE OF AUTHORITIES

Cases:	Page(s)
Alexander v. Choate, 469 U.S. 287 (1985)	2,3
Davis v. Francis Howell School District, 1998 U.S. LEXIS 4192 (8th Cir. March 12, 1998)	4
DeShaney v. Winnebago County Dep't of Soc. *Servs.*, 489 U.S. 189 (1989)	1
Doe v. Judicial Nominating Comm'n, 906 F.Supp. 1534 (S.D.Fla. 1995)	3
Guckenberger v. Boston University, 974 F.Supp. 106 (D.Mass. 1997)	3
International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991)	2,3
Irving Independent School District v. Tatro, 104 S.Ct. 3371 (1984)	2
Stillwell v. Kansas City, Mo. Brd. of Police Comm'ners, 872 F.Supp. 682 (W.D.Mo. 1995).	3
United States v. Williams, 504 U.S. 36 (1992)	1
W. B. v. Matula, 67 F.3d 484 (3d Cir. 1995)	2

THE DEBORDS' QUESTION PRESENTED, BRIEFED BELOW AND PASSED UPON BY THE EIGHTH CIRCUIT COURT OF APPEALS, IS APPROPRIATE FOR REVIEW BY THIS COURT

Notwithstanding Respondents' contrary contention, the Eighth Circuit expressly passed upon the issue embodied in the Question Presented -- and did so based on briefing by both Petitioners and Respondents. Even if this issue were not briefed below, and it was, the fact that the Court of Appeals squarely addressed the issue more than suffices to raise it in the Question Presented. *See, e.g. United States v. Williams*, 504 U.S. 36, (1992); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 n. 2 (1989). As this Court made clear in *Williams*, 504 U.S. at 41-42 :

> Our traditional rule . . . precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." . . . . "**It suffices** for our purposes that the **court below passed on the issue presented**[.]" (citations omitted; internal quotation marks omitted)(emphasis added).

The Eighth Circuit most certainly passed on the issue of whether speculative concerns of harm and liability excuse a school district from providing the requested accommodation (here, a high dose of Ritalin). *See Debord v. Board of Education* at A-6, A-8 (reprinted in Petitioners' Appendix B). The DeBord court noted that the school district "expressed motivations of fear of student harm and potential liability" and that such concerns "may be speculative"). Thus, this Court, in keeping with its tradition in certiorari review, may and should consider the Question Presented.

THE *DEBORD* DECISION, THAT INDIVIDUALS WITH DISABILITIES CAN BE DENIED ACCESS TO SERVICES BASED ON SPECULATIVE CONCERNS OF HARM AND LIABILITY, CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

As detailed in Petitioners' opening brief, the Eighth Circuit decision in *DeBord* conflicts with, *inter alia*, *Irving Independent School District v. Tatro*, 104 S.Ct. 3371 (1984); *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); and *Alexander v. Choate*, 469 U.S. 287, (1985). Respondents' argument that *Tatro* is inapposite because it dealt with the non-medical health service of catheterization, rather than the administration of medication (which *Tatro* also discussed), actually **strengthens** the applicability of *Tatro* to the instant case. If, as this Court held in *Tatro*, a school district must provide the risky procedure of catheterization to a student with a disability, then, *a fortiori*, a school district certainly must manage the so-called risks in administering a medication as prescribed to accommodate a student's disability, here, ADHD. *Tatro*, 104 S.Ct. at 3378 n. 12 ("the risks imposed . . . should not prove to be a large burden").[1]

Respondents also attempt to avoid the application of *Johnson Controls*. Yet, the highly instructive and analogous reasoning of *Johnson Controls* cannot be explained away. As with the policy in *DeBord*, which barred medication to those children whose prescribed level of medication exceeds the PDR guideline, the policy at issue in *Johnson Controls* barred fertile women from working in positions where the lead level exceeded the federal guideline. The reasoning of *Johnson Controls* applies with greater force here where there is **no** evidence of harm to the

---

[1] *Tatro* involved the predecessor to the Individuals with Disabilities Education Act ("IDEA"). The IDEA and Title II of the ADA must be construed consistently. *See, e.g.*, W. *B. v. Matula*, 67 F.3d 484 (3d Cir. 1995).

child or children in general from Ritalin -- unlike the defendant's evidence in *Johnson Controls* that women's fetuses may, indeed, be harmed by exposure to high levels of lead. In both cases, an entity is obligated by federal statute not to discriminate regardless of concerns of harm and liability.

The *DeBord* decision further contravenes Supreme Court precedent where, as here, the medication policy indisputably "screens out" otherwise qualified individuals, such as Kelly, because their disabilities require a dose-level that is above the policy's PDR-criterion. Such screening out is, itself, discrimination. "The benefit, itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled[.]" *Alexander v. Choate*, 469 U.S. 287, 301 (1985). "The blanket exclusion of all [children needing above-PDR doses] because of an unfounded fear . . . runs afoul of the individualized assessment required by the ADA." *Stillwell v. KansasCity, Mo. Brd. of Police Comm'ners*, 872 F.Supp. 682, 687 (W.D.Mo. 1995). "[P]ublic entities cannot use eligibility criteria that screen out, or tend to screen out, individuals with disabilities." *Doe v. Judicial Nominating Comm'n*, 906 F.Supp. 1534, 1540 (S.D.Fla. 1995); *see also Guckenberger v. Boston University*, 974 F.Supp. 106, 134-135 (D.Mass. 1997)("This tend-to-screen-out concept . . . makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish an individual's chances of participation").

To discriminate against the level of medication required for adequate treatment of a disability is, itself, discrimination against the disability. By allowing a school district (and other entities) to make policies that "screen out" or render ineligible those individuals, such as Kelly DeBord, whose disabilities require unusually high doses of medication, the Eighth Circuit in *DeBord* has ignored Supreme Court precedent and undermined the purpose of Title II of the ADA and §504.

At least one judge in the Eighth Circuit has now recognized the faulty reasoning of *DeBord*. As Senior Judge Myron Bright noted in an extremely similar case, "[I]f the school administers adequate medication for one child's disability and inadequate medication for another child's similar disability, the **school policy discriminates** (emphasis added)." *Davis v. Francis Howell School District*, 1998 U.S. LEXIS 4192 at *11-12 (8th Cir. March 12, 1998)(Bright, Sr. J., concurring)(although recognizing he was constrained by *DeBord* to concur, Judge Bright voiced his frustration, stating, "I question the rationale that the amount of medication necessary for treatment of ADHD does not relate to a student's disability").

CONCLUSION

The Question Presented is appropriate and the Petition for a Writ of Certiorari should be granted to review the decision below.

Respectfully submitted,

REBECCA S. STITH*
STEPHEN E. ROTHENBERG
DAYNA F. DECK
Attorneys for Petitioners
Suite One East
6609 Clayton Road
St. Louis, MO 63117
Ph. 314-721-2500
Fax 314-721-0606

*Counsel of Record